83 - 1431

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DR. CHARLES McDANIEL, et al.,
Petitioners,

v.

GEORGIA ASSOCIATION OF RETARDED CITIZENS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the decision below conflicts with this Court's admonition in *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176, 207-208 (1982), that the Education For All Handicapped Children Act of 1975 does not permit federal courts to choose between competing educational theories and impose their preferences upon the States?

2. Since the district court conceded that its selection from alternative methodologies of educating mentally retarded children was based upon "theoretical" evidence, with no actual injury shown to any particular child under the less expensive educational format used by the State, *i.e.*, no particular child having been shown to have a "need" for costlier approach mandated by the court, does the Court of Appeals affirmance ratify an improper judicial encroachment upon a legislative function in violation of the "separation of powers" principles embedded in Articles I and III of the Constitution?

3. Does the decision below conflict with what this Court said in *Pennhurst State School v. Halderman*, 451 U.S. 1, 24-25 (1981), about the impermissibility of imposing an unanticipated and substantial fiscal burden upon the States under federal Spending Power legislation which hasn't unambiguously delineated the burden as a condition of State participation?

4. Does the decision below, by authorizing a judicial remedy based upon theory and without a showing of actual injury to any particular individual, conflict with prior decisions of this Court concerning "case or controversy" limitations on the exercise of federal judicial power under Article III of our Constitution?

5. Does Section 504 of the Rehabilitation Act of 1973 authorize the parents of a handicapped child to maintain a private action against State and local school boards to obtain inordinately expensive educational services not available to children generally?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals were as follows:

Plaintiffs-Appellees, Cross-Appellants

Georgia Association of Retarded Citizens, individually and in behalf of its members and class,

Russell Caine, individually and in behalf of others similarly situated, by and through his parents and next friends, L. Douglas Caine and Virginia Caine, and

L. Douglas Caine and Virginia Caine, individually and in behalf of others similarly situated.

State Defendants-Appellants, Cross-Appellees

Dr. Charles McDaniel, in his official capacity as State Superintendent of Schools, and individually,

Roy A. Hendricks, A. J. McClung, Mrs. Saralyn Oberdorfer, James F. Smith, Hollis Lathem, Thomas K. Vann, Jr., Pat. G. Kjorlaug, Larry A. Foster, Sr., Asbury Stembridge, and Carolyn Huseman, in their official capacities as State Board of Education Members, and individually, and the

State Board of Education of the State of Georgia

Local (i.e., Savannah-Chatham County) Defendants-Appellants, Cross-Appellees

Dr. Sylvester Rains, in his official capacity as Superintendent of the Savannah-Chatham County Board of Education and individually,

Dr. Donald Knapp, Dr. Martha Fay, Rev. William F. Stokes, II, Emma Adler, Captain Robert Funk, Ester F. Garrison, Spencer Lawton, Jr., Betty McClenden, and Dr. Robert Moreland, Jr., in their official capacities as members of the Savannah-Chatham Board of Education and individually, and the

Savannah-Chatham Board of Education.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, Dr. Charles McDaniel, Georgia's State Superintendent of Schools, the State Board of Education of the State of Georgia, and the ten individuals who comprise its membership, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this action on October 17, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Georgia Association of Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir.

1983). Petitioners' motion for rehearing and suggestion for rehearing en banc were denied by the Court of Appeals without further opinion on December 2, 1983 (not yet reported).

In the district court, following an initial unreported opinion entered on July 12, 1979, denying Respondents' motion for preliminary injunction, a decision on the merits was entered on April 3, 1981 and is reported as *Georgia Association of Retarded Citizens v. McDaniel*, 511 F.Supp. 1263 (N.D. Ga. 1981). The district court entered a subsequent opinion on May 14, 1981 (unreported) denying Respondents' motion to alter or amend the district court's judgment. All of the above opinions and orders of the Court of Appeals and district court, reported and unreported, are included in the Appendix, along with the Judgment of the United States Court of Appeals for the Eleventh Circuit and its denial of Petitioners' petition for rehearing and suggestion for rehearing en banc.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on October 17, 1983, with the order of that Court denying petitioners' motion for rehearing and suggestion for rehearing en banc being entered on December 2, 1983. This petition for a writ of certiorari is filed within the ninety days of the Court of Appeals' denial of the motion for rehearing and suggestion of en banc reconsideration. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Art. I, Sec. 1:

"All legislative Powers herein granted shall be vested

in a Congress of the United States, which shall consist of a Senate and House of Representatives."

U.S. Const., Art. III, Sec. 1:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office."

U.S. Const., Art. III, Sec. 2:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . ."

STATUTORY PROVISIONS INVOLVED

20 U.S.C. § 1401:

"§ 1401. **Definitions**

As used in this chapter—

* * *

(16) The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and coun-

seling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(18) The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term 'individualized education program' means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved."

20 U.S.C. § 1412:

"§ 1412. **Eligibility requirements**

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

* * *

(6) The State educational agency shall be responsible for assurance that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State education agency and shall meet education standards of the State education agency."

29 U.S.C. § 794:

"§ 794. **Nondiscrimination under Federal grants**

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this Title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

STATEMENT OF THE CASE

In *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982), this Court construed the Education For All Handicapped Children Act, 20 U.S.C. § 1401, *et seq.*, in circumstances where a handicapped child was performing better than the average child and was advancing easily from grade to grade. The present case relates to what this Court foresaw in *Rowley* as the dramatically differing educational benefits likely to be obtainable by children at the other end of the spectrum. *See* 458 U.S. *supra* at 202. While the children certified as a *class* by the district court theoretically extended to mentally retarded children generally, *i.e.*, all those mentally retarded children possessed of an asserted "need", the children around whom the evidence and argument actually centered were 28 profoundly and severely mentally retarded (PSMR) children in the Savannah-Chatham County (Georgia) school system's Exceptional Children's Center.

Only one of the 28 children, Russell Caine, was actually named as a representative of the certified class of children.[1] At the time the case was tried, Russell Caine had a chronological age of eleven and a development age of less than two. His I.Q. registered less than 20, and a developmental pediatrician appearing on behalf of Respondents testified that the most that could be expected, assuming proper training, would be his advancement to a developmental age of about three. While other experts on both

[1] The children's class was also represented by the Georgia Association of Retarded Citizens, an organization whose membership includes mentally retarded children and their parents. A second class, comprised of the parents of such children, was also certified. This class was represented by Russell's parents, L. Douglas and Virginia Caine.

sides of the debate were somewhat less pessimistic, all agreed that based upon present knowledge and training techniques, Russell will need care and supervision for the rest of his life.

There is no controversy in this case concerning the *quality* of the individually designed educational programs which the Savannah-Chatham County school system made available for the 28 PSMR children at its Center. Respondents' own witnesses, including Russell Caine's mother, were in general quite laudatory about the program, terming it excellent. Both the developmental pediatrician called by Respondents and their principal special education expert, Dr. Paul Alberto, agreed that insofar as "content" was concerned, the training and instruction Russell Caine was receiving under his Individualized Education Program was appropriate to his needs.

The qualitative excellence of the educational services being provided to PSMR children at the Center is supported by a strong local fiscal commitment. Federal fiscal support to participating States and local school systems under the Education For All Handicapped Children Act amounts to about 12% of total program cost. The uncontroverted evidence shows that while its annual per pupil expenditure for normal children was running about $1,300 per year, fully $11,000 per year was being expended on each PSMR child in the Savannah-Chatham County school system. As a consequence, the Center enjoyed an adult (teacher, teacher's aide, specialist) to pupil ratio approaching one to one, as compared, for example, with testimony concerning a one to six ratio in Dade County, Florida.

What the instant case really involves is an academic controversy between different schools of educational

philosophy, specifically "behaviorism" versus "developmentalism". Both "behaviorists" and "developmentalists" agree that one of the ultimate goals of education is to achieve a "generalization" or transfer of educational skills acquired in the schoolhouse to the home and community—since without this all classroom effort is pretty much a waste of time, effort and money. The two philosophical schools are in direct conflict, however, as to how the agreed upon educational goal is best attained.

"Behaviorism", which became a substantial force in American philosophy through the work of B. F. Skinner, views the learning process as something "external", in other words derived chiefly from external stimuli. Behaviorists are therefore apt to use a system of rewards and punishment in order to modify behavior. Consistent with this approach, "behaviorists" tend to favor a highly structured, tightly controlled educational environment from which the impact of "distractors" (*i.e.*, parents, siblings and all of the unstructured occurrences in the environment of the home and community over which the teacher has no control) has been minimized. This structured approach is also seen in the view of behaviorists that there are neatly packaged, distinct steps in the learning process, which they sometimes refer to as a "hierarchy of learning", consisting of (1) acquisition, (2) fluency, (3) maintenance, and finally the ultimate goal of (4) "generalization" of the school imparted skill into other environments, such as the home and community. They tend to think that the child should be programmed through the first three stages, with the skill solidly in his performance repertoire *before* generalization is attempted.

The "developmental" philosophy, which embraces several subclassifications, is exemplified by the work of

Piaget, Weikart, Yoder and Stephens. It places more importance than behaviorists on the *internal* aspects of the learning process, or what is going on *within* the child—viewing the human factor, including curiosity, natural sequential development, and internal motivation as critical to the learning process. Coming from this direction, developmentalists generally disagree with behaviorists on the desirability of a structured and restrictive environment, whether one is teaching "acquisition" or anything else. Developmentalists favor a multi-environmental approach saying that a child's education absolutely requires that he spend time out of school as well as in school. Parents are viewed not as "distractors" but as effective teachers in their own right. The neatly packaged and not to be mixed steps in the "hierarchy of learning" theory of behaviorists is rejected by developmentalists, who view acquisition, fluency, maintenance and generalization as things which best proceed simultaneously—just as they do in the real world.

The specific conflict in this case stems from the opposed views of behaviorists and developmentalists on the educational impact of the traditional three month summer break in the structured schoolhouse routine. Developmentalists believe that substantial breaks in the formal, structured part of the educational process are educationally desirable, if indeed not necessary, for three reasons. To start with, as one special education expert testifying on behalf of Petitioners put it, the summer vacation is an optimum time for the PSMR children at the Center to have an opportunity to transfer skills learned in the formal school setting into the informal environment of home and community. In that expert's view, depriving a PSMR child of the summer vacation other children have could cause educational injury by making him more

rather than less institutionally dependent. Other experts also indicated their agreement with the developmental theory that there is a non-structured or informal education available in the home or community which is distinct from, just as important as, and wholly unobtainable in, the structured educational environment of the schoolhouse. A third point in the developmental evidence was that PSMR children just as normal children can experience boredom with the formal schoolhouse routine and need periodic vacations.

Behaviorists, on the other hand, since they favor a highly structured approach which minimizes the influence of "distractors", view breaks in the learning process (such as the traditional three month summer vacation) to be educationally harmful. They fear that when a child is out of school for three months he may forget or lose skills which he might not be able to recover within a reasonable period of time—thus hindering his educational progress. Developmentalists refer to this loss as "regression".

Respondents' own experts conceded that their regression theory was speculative and conjectural, that "need" for more than the traditional nine-month program of school operations for mentally retarded children has not yet been experimentally established. Respondents' principal witness on behavioral theory concerning "regression", Dr. Alberto, admitted that he could not quantify how much there would be for Russell Caine or anyone else, or even that it would definitely occur. He conceded that the learning process doesn't cease when a child leavse the schoolhouse and that a lot of learning takes place in the home. He further admitted that it was at least theoretically possible that a child as Russell Caine might actually progress, not regress, in his skill areas or domains

of learning over the summer. Dr. Alberto conceded that any relationship between the length of time out of school and amount of regression (if any) is strictly conjectural. Moreover, according to this expert called by Respondents, "regression" or "forgetting" can occur overnight or even in a matter of minutes. Witnesses on both sides agreed that it could indeed occur while school is in progress and the teacher teaching. Learning something new sometimes obscures old information.

Notwithstanding the admitted absence of experimental research to support their "regression" theory, Respondents initiated the instant action, relying principally upon the Education For All Handicapped Children Act.[1] The complaint, filed by Respondents on November 13, 1978, named Russell Caine, his parents Virginia and L. Douglas Caine, and the Georgia Association of Retarded Citizens, a private association created to promote the special interests of mentally retarded individuals, as plaintiffs. The "classes" claimed to be represented by these plaintiffs were: (1) handicapped children of school age in Georgia who are mentally retarded and "who because of their special needs require more than 180 days of public school programming of special education and related services", and (2) the parents of these children. Named as defendants were those State-level officials who comprised the State Superintendent of Schools and State

[1] P.L. 94-142, 20 U.S.C. §§ 1401, *et seq.* Respondents also invoked the district court's jurisdiction under 28 U.S.C. § 1343 and 42 U.S.C. § 1983 for a claimed deprivation of rights secured by § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and by the Fourteenth Amendment, further asking the district court to exercise pendent jurisdiction over certain State law claims. Because of the nature of its disposition of the litigation, the district court did not reach the constitutional claim, and in its discretion decided not to entertain the State law claims under the doctrine of pendent jurisdiction.

Board of Education of the State of Georgia (sometimes referred to herein as the "State defendants") and those local officials who comprised the Savannah-Chatham County Superintendent of Schools and Board of Education (sometimes referred to as the "Local defendants").

The first consideration given to Respondents' "regression" theory by the district court occurred on July 12, 1979, when it denied Respondents' motion for preliminary injunction. Noting that there was a "fundamental lack of evidence available with respect to the nature and extent of regression" and that the peculiarities of the problem for each child had complicated the question immensely, the district court concluded that:

> "the likelihood, evidenced by expert testimony on both sides, that skills lost through regression would be generally recoverable within a reasonable time, vitiates plaintiffs' argument that such injury is irreparable."

The district court granted, on the other hand, Respondents' motion for class certification.

Following a period of massive discovery the case came on for a bench trial which commenced on June 16, 1980 and ended over a month later, on July 17, 1980. The trial featured a lengthy battle of experts, testifying from developmental and behavioral viewpoints, on what they believed would be the more likely impact of a three month summer break upon mentally retarded children generally and PSMR children in particular.

In addition to meeting Respondents' evidence of behavioral theory with opposing developmental theory concerning the learning process, Petitioners submitted *factual* evidence which indicated that the PSMR children at the Center who were out of school for the summer

following the district court's denial of Respondents' motion for preliminary injunctive relief *in fact* had *not* "regressed". The evidence submitted pointed instead to an overall picture of educational progress during the time the children were out of school for the summer. The uniform conclusion of those special education teachers actually involved in the training of the PSMR children at the Center that they had progressed rather than regressed was based upon (1) personal observation of the teachers, (2) comparison of before and after specific skill testing, and (3) with respect to Russell Caine, specific data which his teacher personally devised to measure his before and after walking and feeding skills. Russell's teacher testified that he had improved slightly in both of these critical skills over the summer break.

A rebuttal expert called by Respondents in an attempt to change Respondents' attack from one of "regression" (which the *factual* evidence didn't support) to a "lowered rate of progress" argument, while disagreeing with the appropriateness of the testing procedures and tests used by the local school system, candidly agreed with "the bottom line" or conclusion of the tests, namely that the children had progressed and not regressed.

In rendering its final decision on the merits on April 3, 1981, the district court agreed with Petitioners that Respondents' evidence in the case:

> "... does not clearly show that any particular PSMR child identified in this case is in need of an extended year."

The district court consequently concluded that since there had been "no definitive showing of a need for an extended school year for any particular children", the threat of irreparable harm had not been sufficiently shown

to merit the mandatory injunctive relief plaintiffs (now Respondents) sought.

Notwithstanding this express finding on the absence of "need" or substantial "injury" as to any particular child, however, the district court, based upon evidence of Respondent which it conceded was "theoretical", enjoined and restrained Petitioners from maintaining a policy (which it found to exist) of refusing to consider and provide for educational "needs" in excess of the traditional nine month school year. The district court held that local and State "policies" of not considering such "needs" (*i.e.*, the "needs" not shown to exist) violated both the Education For All Handicapped Children Act and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

Following the district court's denial of Respondents' motion to alter or amend its judgment, Petitioners and the local defendants appealed from that part of the district court's final order and judgment which required them, in the absence of any demonstrated "need" on the part of any particular child for an extended school year, to nonetheless consider the so-called "need" perceived by behavioral theory and provide a mentally retarded child with an extended school year "if needed". Respondents cross-appealed from the denial of their request for mandatory injunctive relief which would have required the immediate provision of summer programs for Russell Caine and the other PSMR children in the Savannah-Chatham County school system.

On appeal, the United States Court of Appeals for the Eleventh Circuit, in a split decision, affirmed the decision of the district court in all respects. Concerning the dis-

trict court's refusal to find a *substantive* injury, the majority opinion of the Court of Appeals concluded that the district court had nonetheless found a *procedural* injury in the State and local defendants' refusal to consider the contended but undemonstrated "need" for an extended school year. The majority opinion of the Court of Appeals held that this *procedural* injury met the "case or controversy" requirements of Article III of our Federal Constitution and that the district court's disposal of the action consequently fell within the broad remedial discretion under the Education For All Handicapped Children Act (*i.e.*, "such relief as the court determines is appropriate", *see* 20 U.S.C. § 1415(e)(2)). The dissenting opinion of Circuit Judge James C. Hill is based upon the rationale that the Congress may not, consistent with the separation of powers provisions of Articles I and III of our Constitution, delegate the power and responsibility to determine, on a case-by-case basis, what the "appropriate" answer is to the education of the handicapped problem seen by the Congress to confront the country, since this places the district courts in the position of engaging in what is essentially a legislative rather than judicial function (*i.e.*, determination of the "appropriate" solution to the problem of providing educational opportunities for handicapped children).

REASONS FOR GRANTING THE WRIT

1. **The decision below is in conflict with this Court's admonishment in *Rowley* that the Education For All Handicapped Children Act does not permit federal courts to choose between competing educational theories and impose that selection upon the States. Where as here, the judicial preference is admittedly based upon "theoretical" evidence, with no actual injury shown to have resulted to any identified child under the disfavored methodology of the State, and no "need" having been demonstrated on the part of any particular child for the district court's choice of methodology, the decision of the Court of Appeals also has the effect of condoning improper judicial encroachment upon a legislative function, thereby raising substantial questions under the "separation of powers" provisions of Articles I and III of our Constitution. The issues presented are of vital importance to the several States in the critical area of federalism and school funding, and ought to be passed upon by this Honorable Court.**

(a) The conflict with *Rowley*

Referring to the two prongs of the inquiry mandated by *Rowley*,[3] the Court of Appeals held that "by completely ignoring a crucial factor in the assessment of appropriateness" Georgia has failed both prongs.[4] The problem with the Court of Appeals' conclusion is that it rests upon a

[3] *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207 (1982), states:

"Therefore, a court's inquiry in suits brought under § 415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more."

[4] *Georgia Association of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1576 (11th Cir. 1983).

foundational (if unacknowledged) choice the Court makes between competing educational theories. What the Court of Appeals concludes to have been "ignored" by Georgia (namely consideration of the utility of providing year round education for mentally retarded children) is plainly "*a crucial factor* in the assessment of appropriateness" *only in behavioral theory*, not developmental theory. Moreover, the matter is pure "theory" since the district court expressly found that the evidence before it had not demonstrated a "need" for an extended school year on the part of "any particular children", and that Respondents' evidence of "the *possibility* of regression in mentally retarded children because of summer breaks in programming" (italics added) was "theoretical". *Georgia Association of Retarded Citizens v. McDaniel*, 511 F.Supp. 1263, 1273, 1282 and 1285 (N.D. Ga. 1981).

In affirming and concurring with the district court's act of choosing between competing educational philosophies or theories (*i.e.*, the behavioral theory to which the Court of Appeals' conclusion of both procedural and substantive noncompliance by Georgia is tied), the Court of Appeals overlooked what this Honorable Court said in *Rowley* about the impropriety of federal courts imposing their view of preferable educational methods upon the States, or making choices from competing educational theories and requiring States to follow the judicial preference. *See, Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 207-208 (1982); *see also Rettig v. Kent City School District*, 720 F.2d 463, 466 (6th Cir. 1983).

Absent the district court's and Court of Appeals' impermissible (under *Rowley*) adoption of behavioral theory as the foundation for its analysis, the prongs of judicial

inquiry of *Rowley* are met. From a procedural viewpoint, no one has ever contended that Individualized Education Programs (I.E.P.'s) have not been formulated for Russell Caine and the 27 other PSMR children at the Savannah-Chatham school system's Exceptional Children's Center, or that these I.E.P.'s do not contain the requisite statements of educational goals and services to be provided for the children. *See* 20 U.S.C. § 1401(19). Nor has it ever been contended that the I.E.P.'s failed to set forth individualized programs of education which have been specially designed to meet educational "needs" of each child at the Center.[5] To the contrary, Respondents principal special education expert, Dr. Alberto, agreed that the areas of training and instruction which Russell Caine's I.E.P. provided for were appropriate to his needs. The check list items of 20 U.S.C. § 1401(18) to which this Court referred in *Rowley*,[6] are also easily satisfied. The special education programs (instruction and supportive services) provided for Russell Caine and the 27 other PSMR children at the Center were provided at public expense and undisputably "meet the standards of the State educational agency". The children have had I.E.P.'s developed at staffing conferences between parents and school officials as contemplated by 20 U.S.C. § 1401(19), and no one has ever suggested that the instruction and training actually provided isn't in conformity with what is described in the

[5] While the Act requires that the instructional program which is set forth in the I.E.P. be one which has been specially designed to meet the unique needs of the handicapped child, *see* 20 U.S.C. §§ 1401(16) (19), this is not the same as saying that the Act requires that each and every imaginable, theoretical, or parentally asserted educational "need" must be considered and provided. Under *Rowley*, the test of whether enough educational "needs" are being considered and provided would appear to turn on whether the child is benefiting from the instructional program provided. *See Rowley*, 458 U.S. at 189.

[6] 458 U.S. at 189.

I.E.P.'s.

From a substantive viewpoint (*i.e.*, the second prong of the *Rowley* inquiry, which is whether the I.E.P. developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits) the testimony of Respondents' own witnesses about how the Center was "doing an excellent job for Russell", and the general laudatory comments about the quality of the children's programs, plus the educational progress of the PSMR children testified to by witnesses for both sides, showed that the children were receiving educational benefits.

(b) **Judicial encroachment on the legislative function**

The district court's action of choosing between competing educational theories and compelling the State to comply with its selection is aggravated by the fact that it was based upon evidence which the trial court expressly noted was "theoretical", based upon speculative testimony about what "might" happen, "could" happen, or was a "possibility" under behavioral theory. *See, Georgia Association of Retarded Citizens v. McDaniel*, 511 F.Supp. 1263, 1272-1273 (M.D. Ga. 1981). The district court's selection of the costlier educational methodology occurred in the face of its own finding that the evidence in the case:

> "... does not clearly show that any particular PSMR child identified in this case is in need of an extended year." 511 F.Supp. at 1282, *see also*, 511 F.Supp. at pp. 1285-1286.

It is the position of Petitioners that since the judicial selection of an alternative educational theory occurred in the absence of a showing that the disfavored theory had

caused injury to so much as one identified child, or that any identified child in fact had a "need" for the theory favored by the court, the Court of Appeals' affirmance condoned what is plainly a judicial encroachment upon an essentially legislative function. We have a standard or level of "appropriateness" for educational services for handicapped children determined not by the Congress (which presumably enacted the Act as an "appropriate" legislative response to a perceived national need), or even as Congress itself directed, *i.e.*, "the standards of the *State* educational agency" (20 U.S.C. §§ 1401(18) and 1412(6)), but precisely on that "case by case adjudication by the courts" which *Rowley* indicated was improper. See 458 U.S. at 190, n.11.

Particularly where there is no substantive injury to any identified, particular human being which might be said to justify a *judicial* weighing and selection of one educational methodology over another under the guise of providing a judicial remedy, such a weighing and choosing is inherently a legislative, not a judicial function. As the dissenting opinion of Circuit Judge Hill points out, determination of what constitutes an "appropriate" solution to the problem of furnishing education for handicapped children is not an appropriate judicial function under the "separation of powers" provisions of Article I, Section 1 and Article III, Section 1 of our Constitution.

2. The decision below imposes a substantial and unanticipated fiscal burden on States participating in the Education For All Handicapped Children Act, and is consequently in conflict with what this Court said in Pennhurst State School v. Halderman, 450 U.S. 1, 24-25 (1981), about the impermissibility of imposing such burdens under Spending Power enactments which do not unambiguously identify the burden as a condition of State participation.

Rowley[7] confirms that the Education For All Handicapped Children Act is a Spending Power enactment to which the *Pennhurst*[8] strictures apply. Nothing in the Act so much as suggests, much less unambiguously identifies, any obligation on the part of a participating State to provide individualized education programs for handicapped children in any educational format other than the customary nine month school year, five day school week, or normal school day during which the State makes educational services available to children generally.

To the contrary, the Act seemingly points in quite the opposite direction. Eligibility requirements providing for implementation dates of September 1, 1978 and September 1, 1980, *see* 20 U.S.C. § 1412(2)(B), according to Respondents' own special education expert, Dr. Alberto, were designed to be substantially coterminous with the beginning of the well-recognized *school year* which obtains in most if not all States. At the time the Education For All Handicapped Children Act was enacted (1975), as today, the term "school year" was commonly recognized across the United States as that approximately nine

[7] 458 U.S. at 204, n.26.

[8] *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981): "The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'. . . . Accordingly, if Congress intends to impose a condition on the grant of federal monies, it must do so unambiguously."

month period commencing around the start of September and ending towards the end of May or early in June. The legislative history of the Act contains numerous references to this traditional "school year", *see, e.g.*, 94th Cong., First Sess., Senate Conf. Rpt. 94-455, U.S. Code Cong. & Admin. News, p. 1492 (1975), and in commentary following 35 C.F.R. § 300.343, it is pointed out that:

> "The dates on which agencies must have individualized education programs (IEP's) in effect are specified in § 300.342 (October 1, 1977, and the beginning of each school year thereafter). . . .
>
> "In order to have IEP's in effect by the dates in § 300.342, agencies could hold meetings *at the end of the school year or during the summer preceding these dates*. . . ." (Italics added.)

Certainly nothing in the above communicated to participating States that they might become obligated to provide handicapped children with special education programs on a year round basis. The majority decision of the court below nonetheless concludes that this unanticipated burden can be imposed as a court mandated standard or level of educational "appropriateness"—apparently on the theory that by agreeing to do that which is "appropriate" the State has agreed in advance to whatever level or standard a court may come up with in its determination of substantive "appropriateness". *See Georgia Association of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1577-78 (11th Cir. 1981). This is, of course, entirely inconsistent with the Act's express definition of "free appropriate public education" as something which is to be measured according to "the standards of the *State* education agency", and not by the favored educational philosophy of a federal court. *See* 20 U.S.C. § 1401(18)(B).

That the fiscal burden which would be incurred by States (and more particularly by local school systems)

would be substantial if they are required to operate schools during the summer would not appear to require extended argument. As previously pointed out, under the current nine month program during which the Savannah-Chatham County school system provides educational services for its 28 PSMR children it has been spending about ten times as much per PSMR child as it spends for the so-called normal child ($11,000 per year as compared to $1,300 per year). Operating schools during the summer (*i.e.*, a 25% increase in the current school year) would manifestly be expensive. Moreover, the burden would have to be funded under a program in which the Federal share has been running about 12%, leaving 88% of the overall cost to State and local government. Since the federal assistance is on a "head count" basis, no additional funds could be anticipated for the support of summer programs. We respectfully submit that the imposition of such a burden on State and local government under the Spending Power ought to require the clearest possible enunciation in the Act. This sort of clear and unambiguous language is, for the reasons stated, conspicuous by its absence in the Education For All Handicapped Children Act. The decision below is, we think, in plain conflict with *Pennhurst State School v. Halderman*, 451 U.S. 1, 17, 24-25 (1981).

3. The decision below, authorizing a judicial remedy based on theoretical evidence and without a showing of actual injury to any particular individual, conflicts with prior decisions of this Court concerning the "case" or "controversy" limitations placed on the exercise of federal judicial power by Article III, Section 2, of our Constitution.

Article III, Section 2 of the Constitution of the United States restricts the exercise of judicial power by federal courts to "cases" and "controversies", precluding, among

other things, the rendition of advisory opinions. *E.g.*, *Golden v. Zwickler*, 394 U.S. 103, 108 (1969). While the "case" or "controversy" requirement involves a number of differing elements, for example "standing", it is settled that whatever else may be embraced by "case" or "controversy", its essence is a requirement of "injury in fact". *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 218 (1974). *See also, e.g., Warth v. Seldin*, 422 U.S. 490, 499 (1975). That the action, or as here "policy", complained of may be viewed by the federal court as being at odds with federal law is not, sans *injury in fact*, sufficient to authorize an exercise of federal judicial power. *United Fuel Gas Co. v. R.R. Comm'n. of Kentucky*, 278 U.S. 300, 310 (1929). *See also, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472-475 (1982); *Boyle v Landry*, 401 U.S. 77 (1971). As this Court explained in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976):

> "Absent such a showing, exercise of its power by a federal court would be gratuitous and inconsistent with the Article III limitation."

"Injury in fact" requires injury which is real rather than merely abstract, theoretical, conjectural or speculative. *See Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 219 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Younger v. Harris*, 401 U.S. 37, 42 (1971). Where the pleadings indicate the existence of a "case" or "controversy" in the first instance, and a showing of the absence of real as opposed to merely theoretical injury later occurs during the course of litigation, the appropriate judicial response is dismissal for mootness under Article III, Section II. *C.f., Deposit Guaranty National Bank of Jackson, Mississippi v. Roper*, 445 U.S. 326, 332-335 (1980).

While we recognize that the certification of an action as a "class" action gives the "class" a legal status separate from the interests asserted by the individual who claims to represent it, *Sosna v. Iowa*, 419 U.S. 393, 399 (1975), and that a ruling on the merits against the individual does not moot out the action as to identifiable members of the class who are in fact shown to have suffered real injury, *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 752-756 (1973), we would think that the use of a class action, which is a procedural device, manifestly cannot circumvent the *substantive* constitutional limitations of Article III. As pointed out in *Wilson v. Kelley*, 294 F. Supp. 1005, 1010 (N.D. Ga. 1968) [three judge district court] *aff'd.*, 393 U.S. 266 (1968):

> "While great latitude has been allowed in class actions involving civil rights, it is fundamental that some plaintiff must show injury and that the proposed class can rise no higher than the individual plaintiffs themselves."

For the judicial power of a federal court to be exercised in favor of the grant of either declaratory or injunctive relief, in other words, it is still necessary for plaintiffs to show some "injury in fact" to some particular member of the class, as opposed to theoretical or speculative belief that there may be, somewhere, some wholly unidentified member of the purported class who "might" suffer injury. As we have seen, the district court in this action expressly stated that it found no substantive injury (*i.e.*, injury in fact as opposed to theory) to have been inflicted upon any particular mentally retarded child by virture of the nine month educational program currently provided by the State and its local school systems. Based upon what it conceded was theoretical evidence it expressed a belief that somewhere in the State of Georgia there might

possibly be some child who has a "need" for education on an extended year basis. We would respectfully submit that if and when any particular mentally retarded child is *in fact* shown to be unable to benefit educationally from services rendered during the traditional nine month school year, this will be time enough to determine his entitlement to a summer program under the Act. Should that situation ever arise, we would have a "case or controversy". We think that the judicially determined absence of such a "need" for any particular child who has been identified in this particular case renders the exercise of judicial power by the district court and Court of Appeals inconsistent with the limitations placed upon that power by Article III, Section 2.

4. **The Court of Appeals' holding that Section 504 of the Rehabilitation Act of 1973 authorized Respondents to maintain a private action to compel a State to provide mentally retarded children with expensive educational services not available to children generally is inconsistent with what this Honorable Court has said about Section 504 not being an "affirmative action" statute.**

On its very face Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, shows that it is an "access" statute not an "affirmative action" statute. Its intent and design is to prevent the "exclusion" of "otherwise qualified" handicapped children from existing programs or activities which are in part funded through federal financial assistance. It states quite succinctly that no handicapped individual shall:

> ". . . solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

In *Southeastern Community College v. Davis*, 442 U.S. 397, 410-413 (1979), this court seemingly made clear the fact that Section 504 and its concern with access to existing federally funded programs is not to be construed as a mandate for the creation of costly new services or programs, such as the extension of the school year from the traditional nine month period to twelve months for mentally retarded children would plainly be. To the extent that any regulations promulgated under Section 504 might be construed as requiring affirmative action through the providing of costly additional educational services (*i.e.*, year round education), such regulations would be invalid since the Secretary has no authority to rewrite the statutory scheme by means of regulations. *See University of Texas v. Camenisch*, 451 U.S. 390, 399 (1981) [Concurring Opinion of Chief Justice Burger]. We think that the opinion below, in holding that Section 504 does contain an "affirmative action" mandate is particularly inappropriate where as here not so much as one mentally retarded child has been identified as having demonstrated a "need" for the extended school year Petitioners have been judicially compelled to consider and provide if necessary.

CONCLUSION

For all of the reasons stated, the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit should be granted and the decision below reversed by this Honorable Court.

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Appendix

OPINION OF THE COURT OF APPEALS

GEORGIA ASSOCIATION OF RETARDED CITIZENS, et al., Plaintiffs-Appellees, Cross-Appellants,

v.

Dr. Charles McDANIEL, etc., et al., Defendants-Appellants, Cross-Appellees.

No. 81-7485.

United States Court of Appeals,
Eleventh Circuit.

Oct. 17, 1983.

Appeal from the United States District Court for the Northern District of Georgia.

Before HILL and VANCE, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

In this controversy, we are asked to determine whether plaintiff Russell Caine, a profoundly mentally retarded child, and members of the certified class are entitled, under applicable federal statutes and regulations, to more than 180 days of public education in Georgia each year upon a showing of need. Plaintiffs contend, and the district court found, 511 F.Supp. 1263, that the defendants refused as a matter of policy to consider or provide such education in all cases. The court also determined that this policy results in regression in the training of profoundly and severely mentally retarded children. We conclude that the district court's findings are supported by the record and that the refusal to consider or provide

year round educational programs is contrary to the defendants' obligations under the Education for All Handicapped Children Act and § 504 of the Rehabilitation Act of 1973 to provide a free public education serving each handicapped child's particular needs.

I. Background

Defendants, comprising the Georgia Superintendent of Schools, the Georgia State Board of Education and that Board's individual members ("state defendants"), and the Superintendent of the Savannah-Chatham School System, the Savannah-Chatham Board of Education and its individual members ("local defendants"), appeal from a judgment of the United States District Court for the Northern District of Georgia enjoining the policy by which the defendants do not consider or provide more than 180 days of education for profoundly and mentally retarded ("PSMR") children. Defendants challenge the district court's findings of fact and conclusions of law. Plaintiffs, who are Russell Caine, a PSMR child, his parents, L. Douglas and Virginia Caine, the Georgia Association of Retarded Citizens ("GARC") [1] and two classes composed of (1) all handicapped school aged children in Georgia who are mentally retarded and require more than 180 days of public school programming and (2) the parents and guardians of these children, cross-appeal from the district court's order failing to reach a determination of specific need for Russell Caine and other individual PSMR children. The plaintiffs also challenge the lack of specificity of the district court's injunction.

In early 1978, the Caines appealed the decision of the

[1] The GARC is a non-profit state wide organization created to promote the interests of mentally retarded citizens of all ages.

Savannah-Chatham County Board of Education denying their son placement in a full year educational program. Russell Caine, nine years old at the time this suit was filed, had a mental age of two. As with most other PSMR children, he required training in basic living skills, including walking, feeding, and toilet use. On April 18, 1978, an administrative hearing was held before the Chatham County Hearing Review Board, affirming the School Board's decision. An appeal to the State Board of Education in May, 1978, similarly produced an adverse ruling. The Caines filed this action in November, 1978, challenging the Board's decision under the Education for All Handicapped Children Act ("the Act" or "the Handicapped Act"), 20 U.S.C. § 1401 *et seq.*, § 504 of the Rehabilitation Act of 1973 ("§ 504"), 29 U.S.C. § 794, the equal protection and due process clauses of the Fourteenth Amendment of the Constitution, and under the Georgia Constitution and the Adequate Program for Education in Georgia Act, Georgia Code Annotated § 32-601a *et seq.*

In June, 1979, the district court held an evidentiary hearing on plaintiff's motion for preliminary injunction and class certification. The district court determined that plaintiffs did not show irreparable injury and that it would not be in the public interest to grant a preliminary injunction. The court certified two separate classes of plaintiffs. The first class is composed of "all handicapped children of school age in the state of Georgia who are mentally retarded, and who because of their special needs, require more than 180 days of public school programming of special education and related services." The second class is composed of all parents or guardians of all children in the first class.

The case was tried on the merits without a jury during the summer of 1980. The district court rendered its opinion on April 2, 1981, granting an injunction against the challenged policy but refusing to require specific educational placement for any of the children. After oral argument on appeal, we received briefs from the parties assessing the impact of the Supreme Court's decision in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, ___ U.S. ___, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). We then solicited the parties' views on the procedural appropriateness of an apparent attack by a private party on the state plan brought under 20 U.S.C. § 1415(e)(2) as a challenge to an individualized education program. We also requested advice from the Secretary of Education on his role in such a suit and entertained a brief from the United States as *amicus curiae*. We first outline the Handicapped Act's mandates, the primary statute under which this suit was brought, as interpreted by *Rowley*, so as to be on firm footing in addressing the procedural questions we posed to counsel. We next turn to the substance of the defendant's contentions on appeal, and lastly to the issues presented on cross appeal.

II. The Handicapped Act

[1] Congress intended, by adopting the Handicapped Act, to encourage and assist the provision of a free and appropriate education by the states to all handicapped children. The Act was passed in response to Congress' perception that most handicapped children in the nation "were either totally excluded from schools or [were] sitting idly in the regular classrooms awaiting the time when they were old enough to 'drop out'." House of Representatives Report No. 94-332, p. 2 (1975). The Act is

a model of "cooperative federalism" in that it offers funds in exchange for the acceptance of certain standards for the education of handicapped children. This case arises from the proper interpretation and application of those standards.

An analysis of the Act must be bottomed on the central role states play in educating their citizens. The Supreme Court has recognized that:

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. Thus, in *San Antonio School District v. Rodriguez*, we observed that local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence'.

Milliken v. Bradley, 418 U.S. 717, 741-42, 94 S.Ct. 3112, 3125, 41 L.Ed.2d 1069 (1974). (Cites omitted). *See also San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 19 (1973).

Yet a state's responsibility for providing education is bounded by certain congressionally developed concerns once the state accepts federal financial assistance under the Act. Federal delimitations upon state educational programs for the handicapped reflect two core principles: first, that each handicapped child's education must be carefully crafted to meet that child's individual needs so that the child may benefit from his or her education; and second, that states must adopt extensive due process procedures to insure that substantive individual needs are

met. The statutory requirement of an "appropriate" education draws its content from these principles.

The central requirement a state receiving federal funds under the Handicapped Act faces is to effect a "policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412(1). The Act plainly provides that such an education must be uniquely suited to each handicapped child's needs. The Act defines free appropriate public education as:

> *Special Education* and related services which (A) have been provided at public expense under public supervision and direction, and without charge, (B) meet the standards of the state educational agency, (C) include an appropriate pre-school, elementary, or secondary school education in the state involved, and (D) are provided *in conformity with the individualized education program* required under § 1414(a)(5) of this title.

20 U.S.C. § 1401(18) (emphasis added). Moreover, the Act defines "special education" as a program of instruction which is "*specially designed* . . . to meet the *unique needs* of a handicapped child." 20 U.S.C. § 1401(16) (emphasis added). "Related services" are "such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services . . .) as may be required to assist a handicapped child to benefit from special education . . ." 20 U.S.C. § 1401(17).

[2] In addition, the Act so clearly delineates the "individualized education program" ("IEP") which must be developed for each handicapped child that there can be no question under the statute that the State is responsible for meeting a child's *unique* educational needs. The IEP is to be developed as a written statement for each

handicapped child in a meeting between the teacher, parents or guardian, and local educational agency representative. The statement must include a discussion of: the child's present level of performance; annual goals and short-term instructional objectives; the specific educational services to be provided to the child; the extent to which the handicapped child is able to participate in regular educational programs; the projected date of initiation and duration of the services; and the means for determining whether the instructional objectives are being met. 20 U.S.C. § 1401(19).

The IEP is more than a mere exercise in public relations. It becomes the basis for a handicapped child's entitlement to an education in conformance with the IEP, 20 U.S.C. § 1401(18)(D), and for a host of procedural rights in the event a child's education deviates from a mutually arrived upon IEP. Thus, parents are entiled under the Act to written prior notice whenever an educational agency proposes or refuses to initiate a change in the evaluation or educational placement of their child or the provision of a free appropriate public education to a handicapped child. 20 U.S.C. § 1415(b)(1)(C). Parents or guardians are to be afforded an impartial due process hearing before, at least in the last administrative resort, the state educational agency, 20 U.S.C. § 1415(b)(2) and 20 U.S.C. § 1415(c), complete with all the requisite rights of a full trial. 20 U.S.C. § 1415(d)(2) [Counsel or other qualified advisors; present evidence; cross-examine; compel attendance of witnesses; record of hearing; and written findings of fact and decision]. Finally, parents have a right to appeal a decision of the state educational agency to a United States district court, which shall hear such additional evidence necessary to engage in a *de novo* resolution of the complaint. 20 U.S.C. § 1415(e)(2), (4).

In addition, the Act requires that each state adopt a plan assuring, *inter alia*, that all federal funds will be spent in a manner consistent with the provision of a free appropriate public education to all handicapped children in the state. 20 U.S.C. § 1413(a)(2). The Commissioner of Education (the "Commissioner") is required to review all state plans and approve only those providing such assurances.[2] 20 U.S.C. § 1413(c). The Commissioner is empowered with authority to terminate federal funding under the Act, after reasonable notice and the opportunity for a hearing, should he or she determine that a state has failed to meet its statutory obligations. 20 U.S.C. § 1416(a). The Commissioner's decision is reviewable in the United States Court of Appeals for the circuit in which the objecting state is located. 20 U.S.C. § 1416(b).

In *Rowley*, the Supreme Court determined that an eight year old deaf child who could read lips well, was advancing easily from grade to grade, and performed better than the average child was not entitled to a sign-language interpreter. In construing the Act's requirement of an "appropriate" education, the Supreme Court rejected the argument that states must provide "a potential-maximizing education." *Rowley*, 102 S.Ct. at 3046 n. 21. The Court declined to impose any particular substantive standard on the states, but noted that implicit in the Act was the principle that a handicapped child's education must confer some benefit upon that child. *Id.* 102 S.Ct. at 3048. The Court did, moreover, identify a "basic floor of

[2] The responsibilities of the United States Commissioner of Education were transferred to the Secretary of Education with the Department of Education Organization Act, Public Law No. 96-88, 96th Congress, 1st Session (1979). See 20 U.S.C. § 3441. The regulations governing implementation of the Handicapped Act, originally codified in title 45 CFR were recodified at 34 CFR Part 300 after the creation of the Department of Education.

opportunity" provided by the Act, which "[c]onsists of access to specialized instruction and related services which are *individually designed* to provide educational benefit to the handicapped child." *Id.* 102 S.Ct. at 3049 (emphasis added). The Court emphasized that such instruction and services must comport with the child's IEP. *Id.*

Based upon this interpretation of the Act, the Supreme Court delineated the appropriate scope of review for a court faced with a challenge to state educational decisions. According to the Court,

> a court's inquiry in suits brought under § 1415(e)(2 is two-fold. First, has the State complied with the pro cedures set forth in the Act? And second, is the indi vidualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Rowley, 102 S.Ct. at 3051 (footnote omitted).

Notably, the Court also directed that the first prong of this inquiry, whether the State has complied with the Act's procedures, "will require a court not only to satisfy itself that the State has adopted the state plan, policies, and assurances required by the Act, but also to determine that the State has created an IEP for the child in question which conforms with the requirements of § 1401 (19)." *Id.* 102 S.Ct. at 3051 n. 27.

III. Procedural Prerequisites

Having developed an understanding of the statutory scheme Congress devised to assist states in educating handicapped children, we shall apply the Supreme Court's guidelines to our review of the adequacy of Georgia's com-

pliance with the Act. However, we first address certain threshold procedural questions raised by the defendants that go to this Court's power under the Constitution to render an opinion in this case.

[3, 4] The defendants asserted at oral argument that this case is moot because named plaintiff Russell Caine no longer resides in Chatham County and the Court therefore may no longer provide him any relief. Defendants fail to realize that the action still presents a "live controversy" as to the unnamed class members. Upon certification the class attained a legal status distinct from Russell Caine's asserted interest in the law suit. This interest continues today and is evidenced by the vigorous efforts with which the arguments of the class have been urged during these proceedings. *See Franks v. Bowman Transportation Company*, 424 U.S. 747, 752-55, 96 S.Ct. 1251, 1258-60, 47 L.Ed.2d 444 (1976) (employment discrimination class action); *Sosna v. Iowa*, 419 U.S. 393, 397-403, 95 S.Ct. 553, 556-59, 42 L.Ed.2d 532 (1975) (class action challenging residency durational requirement for divorce.). *See also Goosby v. Osser*, 409 U.S. 512, 514 n. 2, 93 S.Ct. 854, 856 n. 2, 35 L.Ed.2d 36 (1973); *Sands v. Wainwright*, 491 F.2d 417 (5th Cir.1973) (en banc).[1]

[1] The defendants also challenge the propriety of certification of the plaintiff classes due to alleged indefiniteness of the composition of these classes. Our determination that the case is not moot inherently relies upon the appropriateness of the class certification. The district court certified a class of all handicapped school aged children in Georgia who are mentally retarded and require more than 180 days of public school programming. The court certified a second class consisting of the parents or guardians of children in the first class. Defendants contend that, because the class definitions themselves are premised upon findings of need, the classes are inherently indefinite and therefore impermissible.

Defendants' argument here is without merit. "It is axiomatic that the decision to or not to certify a class is discretionary, and the determination of the trial court should stand absent an abuse of dis-

[5] Defendants also claim that the district court rendered a purely advisory opinion due to the absence of a case or controversy. Defendants argue that the district court explicitly found that the plaintiffs failed to show sufficient identifiable injury to warrant the issuance of a mandatory injunction. The district court concluded, however, that the plaintiffs did suffer injury in fact due to the existence of a state-wide policy precluding consideration *on the merits* of the need for more than 180 days of education per year in a handicapped child's IEP. The court's findings in this regard and its direction that the appropriate state or local educational agency determine each child's educational needs without limitation, establishes the existence of an adequate case or controversy. The district court clearly found a procedural injury. Moreover, the court's refusal to find a substantive injury arguably resulted from the failure of the State to insure that the proper procedures required under the Act were met. The court's disposal of this action falls within the broad remedial discretion afforded a district court judge under the Act. *See* 20 U.S.C. § 1415(e)(2) ("the court . . .

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cretion, assuming that the court acts within the parameters of Federal Rule Civil Procedure 23." *Walker v. Jim Dandy Company*, 638 F.2d 1330, 1334 (Fifth Cir.1981). *See also Zeidman v. J. Ray McDermott and Company*, 651 F.2d 1030, 1038 (Fifth Cir.1981); *Boggs v. Alto Trailer Sales, Inc.*, 511 F.2d 114 (Fifth Cir.1975); *Hill v. American Airlines, Inc.*, 479 F.2d 1057 (Fifth Cir.1973); 7A C. Wright and A. Miller, Federal Practice and Procedure § 1785, 134-135 (1972). We are unable to find such an abuse of discretion here, "since it is not necessary that the members of the class be so clearly identified that any member be presently determined." *Jones v. Diamond*, 519 F.2d 1090, 1100 (Fifth Cir.1975). *See Carpenter v. Davis*, 424 F.2d 257, 260 (Fifth Cir.1970), *Bailey v. Patterson*, 323 F.2d 201 (Fifth Cir.1963), *cert. denied*, 376 U.S. 910, 84 S.Ct. 666, 11 L.Ed.2d 609 (1964); *Ladd v. Dairyland County Mutual Insurance Company of Texas*, 96 F.R.D. 335 (N.D.Tex.1982). *Also see Battle v. Pennsylvania*, 629 F.2d 269 (Third Cir.1980), *cert. denied* 452 U.S. 968, 101 S.Ct. 3123, 69 L.Ed.2d 981 (1981).

shall grant such relief as the court determines is appropriate.")

[6] Defendant's argument simply misconstrues the requirements of Article III of the Constitution. It confuses the sufficiency of proof with the adequacy of an asserted interest. Plaintiffs have claimed injury in fact and thus have standing to bring this law suit. It is unnecessary to decide whether plaintiff's allegations of harm due to the existence of a state policy will *ultimately* entitle them to any relief in order to hold that there is a sufficient controversy here. "If such impairment does produce a legally cognizable injury, [plaintiffs] are among those who have sustained it." *Baker v. Carr*, 369 U.S. 186, 208, 82 S.Ct. 691, 705, 7 L.Ed.2d 663 (1962). There is no doubt that the plaintiffs have "*alleged* such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." *Baker*, 369 U.S. at 204, 82 S.Ct. at 703 (emphasis added).

IV. Statutory Procedural Concerns

After hearing oral argument in the instant action, this Court directed the parties to respond to certain questions dealing with the propriety of a challenge to a purported state policy in the context of a § 1415 request for review of a particular child's IEP. We are now fully satisfied with the appropriateness of the procedures employed by the plaintiffs.

[7] There is no statutory provision by which a concerned parent may challenge a state plan once it has been formulated.[4] While the Commissioner of Education is en-

[4] 20 U.S.C. § 1412(7)(B) requires a state to provide the general public with notice, an opportunity for comment, and public hearings prior to the adoption of a state plan. Once adopted, however, there is no provision for challenging that plan.

titled to disapprove a state plan and cut off the flow of federal funds to the state, 20 U.S.C. § 1413(c), there is no provision for parental intervention in that process.[5] Even if a citizen arguably may institute such a procedure by complaint, the Commissioner could decline to investigate due to the lack of enforcement resources rather than due to any determination on the merits. *Cannon v. University of Chicago*, 441 U.S. 677, 706-08, 99 S.Ct. 1946, 1962-63, 60 L.Ed.2d 560 (1979). Moreover, the availability of intervention in fund termination procedures fails to provide a means for plaintiffs to vindicate their rights by procurement of appropriate educational services. *See New Mexico Ass'n. for Retarded Citizens v. State of New Mexico*, 678 F.2d 847, 851 (10th Cir.1982); *Pushkin v. University of Colorado*, 658 F.2d 1372, 1381 (10th Cir. 1981). Even if procedure for intervention did exist, we are unconvinced plaintiffs would be required to employ it where, as here, that which is under attack became known only upon subsequent proceedings and is not apparent from the face of the plan itself.

[8] There is nothing in 20 U.S.C. § 1415(e)(2) to suggest that the due process rights of a parent under the Act are to be curtailed merely because the challenge to the IEP happens to implicate a portion of a state's plan. We do not find that approval of Georgia's state plan by the Commissioner creates any presumption as to the

[5] Defendants claim that 20 U.S.C. § 1231b-2 establishes the requirement of administrative exhaustion by providing a means to challenge the Commissioner of Education's approval of a plan. We disagree. That provision is part of the general statutory requirements governing federal education programs and is not part of the Handicapped Act. Moreover, it is designed to permit "applicants" or "recipients" of funds, meaning local school districts and *not individuals*, to appeal adverse funding decisions in federally funded state programs. It creates no requirements for parties attacking policies inherent in all IEP's promulgated within a state.

legality of the 180 day policy found by the district court. The plan is silent as to the duration of services to be provided handicapped children. Moreover, the plan does provide that "[f]or agencies conducting *twelve month* educational programs, the school year begins October 1 and ends September 30 for the purpose of IEP's" (emphasis added). Thus, the plan may well have suggested to the Commissioner, who reviewed it without the benefit of knowledge of the State's actual practice, that the State would indeed consider year round schooling when shown to be necessary. We also decline to require as a matter of law that a party bringing a claim under § 1415 join the Commissioner of Education in the proceedings. There is no basis in the statute or the regulations for such a procedure. Requiring joinder of the Commissioner would impinge upon a district court's discretion in managing litigation and does not appear to be necessary under Federal Rules of Civil Procedure 19. Nor would it serve any valuable purpose for it would involve the Commissioner in numerous suits in which he or she had only minimal policy interest and in which the Commissioner would not be in a position to offer any form of relief.

V. District Court's Findings of Fact

The district court explicitly found that the state and local defendants have a policy of limiting education for handicapped children to 180 days per year. The court also determined that PSMR children regressed as a result of the three month summer break in their training. Defendants challenge these factual findings.

[9] As a preliminary matter, we must determine the appropriate standard of review of these findings. Defendants urge that the finding of a state-wide policy of nine

month's education is an "ultimate fact" that may be overturned on review on the basis of mere error. Federal Rules of Civil Procedure 52(a), however, mandates that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Last year, the Supreme Court made clear that the former Fifth Circuit was unjustified under Rule 52(a) in dividing findings of fact between "subsidiary" and "ultimate" issues and then applying a more stringent standard of review to the latter. *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). Rather, any factual "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

A review of the record provides ample support for the district court's conclusion that the local defendants had a policy of not providing more than 180 days education to handicapped children. The local defendants point to several factors weighing against this conclusion. First, they argue that the professional staff of the Exceptional Children's Center ("ECC"), the facility Chatham County operates for PSMR children, unanimously testified to the lack of need for more than nine months education for all the children under consideration in this suit. The local defendants thus claim that they engaged in the requisite individualized determinations. Further, the local defendants point out they indeed sent one child to a summer program. Also, they claim not to have discussed the duration of Russell Caine's program in IEP meetings with his parents because the issue was in litigation.

These arguments are simply unpersuasive. The district court discounted the testimony of the ECC staff because the court refused to believe that not a single child demonstrated need for extended educational placement. Rather, the court was properly convinced that the determination represented a policy decision imposed on and carried out by the EEC staff. We are not at liberty to reassess the district court's obvious credibility choices in this regard. The response of the local defendants to interrogatory #14 confirmed the fact that the county had a policy of providing only 180 day schooling. Moreover, the fact that the local defendants consistently failed to justify refusals to provide year round education on the ground of lack of funding rather than on lack of need strongly supports the existence of such a policy. The failure to discuss Russell Caine's needs in this regard may not be attributed to pending litigation when the meetings under consideration took place even before the Caines filed an administrative appeal. The sole exception the local defendants can muster, that of a mentally retarded child sent to a summer program for emotionally disturbed children, involved a placement decision made apart from the proceedings mandated by the Act.

Strong evidence of the local defendants' restrictive policy convinces us of the correctness of the district court's decision. The Chatham County Hearing Review Board's (the "Board") decision on Russell Caine's appeal stated:

> Evidence indicated that *there is a need for a continuous program to optimally meet Russell Caine's needs, however, State Law does not provide a funding pattern that will allow local education agencies to operate beyond the 180 day school year . . . It is not the responsibility of this Hearing Review Board to decide what might be ultimately appropriate and desirable for a student* but rather, if

> what is being offered is appropriate and adequate under the requirements of the law . . .

(emphasis added). Thus, despite the existence of evidence indicating need of a continuous program, the Board simply refused to consider whether education for more than nine months would be appropriate for Russell Caine. Rather, the Board relied upon the existence of a perceived *State* requirement to dispose of plaintiff Caine's challenge to his IEP. It is beyond peradventure then, that the Board adopted this view of "State Law" as a local policy which allowed the Board to ignore totally the plain facts showing some need for extended education on the part of Russell Caine.

The record also does not leave sufficient doubt to conclude that the district court erred in determining that there is a State policy of limited schooling for handicapped children.[4] The state defendants assert that the state plan is permissive on this question. Yet evidence that the State on appeal has *never* ordered a local board to provide or even consider handicapped student's needs in excess of 180 days is highly persuasive to the contrary. The State has made clear its refusal to pay for handicapped training in excess of the nine month school year. Thus, we agree with the assessment of the district court that "[t]he State defendant's policy, although neutral on its face, has the effect of prohibiting the consideration of a child's needs beyond 180 days."

Plaintiffs' case is premised on the notion that PSMR children regress after a summer break and that home

[4] The State's policy is crucial because the Handicapped Act imposes the ultimate responsibility for compliance with the state educational agency. 20 U.S.C. § 1414(d). The state agency must administer funds and services *directly* if it determines that the local educational agency is failing to provide appropriate programs.

training cannot equal that offered by professionals. Evidence given by the defendants and plaintiffs conflicted sharply on the degree of regression and the speed of recruitment of lost skills. Discounting the major evidence offered by the defendants in this regard as of "doubtful probative value," [7] the district court found that PSMR children, whose training so often involves basic living skills, do indeed experience some regression during breaks in their formal education.[8] We hesitate to reverse the district court where its finds so clearly rest on credibility choices among conflicting experts.

[10] The state defendants offered three rationales for not providing year round education: first, that children need a break from a structured environment to "recharge their batteries" and become motivated to learn again; second, that children need to apply their learned skills in new situations; and third, that children benefit from informal learning. These rationales are not particularly relevant to the factual finding in question; they rather serve as a justification for permitting some regression in light of the asserted benefits of a summer break. When the defendants do address the district court's finding on regression, they fail to muster a worthy argument. Defendants first assert that all students regress, so that the finding is of no consequence. In addition, they claim that PSMR children do not show sharp signs of the regression-recoupment syndrome that are severe enough to render nine

[7] The defendant offered extensive evidence of "portage studies" used to assess mental age and progress in a wide variety of skills. The district court found these to be teaching tools and not designed to measure regression, and also found that the technique was subject to inconsistent application.

[8] The court declined to find that the evidence of regression was strong enough as to any particular child to merit the issuance of a mandatory injunction requiring additional services.

month placement inappropriate. Next, however, they claim that there is no evidence PSMR children regress *at all.* These arguments encapsulate the deficiencies inherent in the defendant's position in this entire proceeding; the defendants justify across the board findings applicable to all PSMR children rather than recognize the need to engage in individual considerations for each child's particular needs. Their wholesale approach to assessing the "facts" of the case is precisely what constitutes an impermissible policy under the Handicapped Act.[9]

VI. District Court's Analysis of the Law

A. The Handicapped Act

The district court concluded that any State policy which prohibits or inhibits full consideration of the particular educational needs of each handicapped child violates the individually-oriented focus of the Handicapped Act. We recognize that the Supreme Court has stated "[t]hat the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Rowley*, 102 S.Ct. at 3043. Nonetheless, after a careful review of the statutes and the relevant precedents, we are left with the abiding opinion that the State failed both prongs of the inquiry *Rowley* mandates. Not only did the State not follow the procedures set forth

[9] Moreover, defendants ignore the statements of the Chatham County Hearing Review Board itself that, "evidence indicated there is a need for a continuous program to optimally meet Russell Caine's needs . . ."

Without implying that the defendants must "optimally" provide for a handicapped child's needs, we do note the inconsistency of the Review Board's statement with defendants' failure throughout the course of this appeal to concede the existence of any detrimental regression on the part of PSMR students.

in the Handicapped Act, but by completely ignoring a crucial factor in the assessment of appropriateness, it also failed to develop IEPs for the plaintiffs that were reasonably calculated to enable all handicapped children in Georgia to receive educational benefits. The district court thus did not *err* in granting relief under the Handicapped Act.

The two core concerns of the Act, as analyzed in part II, *supra*, are the procedures designed to insure particularized education to individual needs and the consequent development of an IEP for each child which incorporates his or her special needs. The State's avoidance of the impact of durational consideration squarely abrogates these fundamental principles. This holding, by itself, does not impose a substantive standard on the state; it requires no more than that the state *consider* the need for continuous education, along with a range of other concerns, when developing a plan of education and related support services that will benefit a handicapped child. That the end *result* of such a consideration may be an arguably substantive decision to impose a year round education in certain cases, whether voluntarily imposed by the state or by a § 1415(e)(2) federal court sitting in review, does not violate the role reserved to states under the Act. The substantive requirement may be met by more sensitive and accurate IEPs and by a recognition of the procedural imperatives that give attention to individual needs, both being goals which Congress unquestionably sought to impose upon the states in educating handicapped children.

The Third Circuit in *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir.1980), *cert. denied*, 452 U.S. 968, 101 S.Ct. 3123, 69 L.Ed.2d 981 (1981), reached the same conclusion we do. The *Battle* court anticipated the Supreme Court's

requirement of "reasonableness" in an IEP and the *Rowley* Court's attention to the procedural requirements of the Act. The court in *Battle* reasoned:

> Rather than ascertaining the reasonable educational needs of each child in light of reasonable education goals and establishing a reasonable program to attain those goals, the 180 day rule imposes with rigid certainty a program restriction which may be wholly inappropriate to the child's educational objectives. This the Act will not permit.

Battle, 629 F.2d at 280. In a post-*Rowley* decision, the Court of Appeals for the Fifth Circuit agrees in full with the Third Circuit and our reasoning here. In *Crawford, et al. v. Pittman, et al.*, 708 F.2d 1028 (5th Cir.1983), the court reversed the district court's judgment which had held that the Act governed only the kind and quality of services the State is required to provide to handicapped children, and not the extent of such services. The court held:

> We conclude that Mississippi's policy of refusing to consider or provide special education programs of a duration longer than 180 days is inconsistent with its obligations under the Act. Rigid rules like the 180-day limitation violate not only the Act's procedural command that each child receive individual consideration but also its substantive requirements that each child receive some benefit and that lack of funds not bear more heavily on handicapped than nonhandicapped children. (footnote omitted).

Similarly in *Yaris v. Special School District of St. Louis County*, 558 F.Supp. 523 (D.E.D.Mo.1983) (memorandum opinion), the court reasoned that any policy which inhibits consideration of the individual educational needs of handicapped children necessarily conflicts with the Act's emphasis on individualized education and the re-

quirement of an IEP. *Accord, Garrity v. Gallen*, 522 F. Supp. 171 (D.N.H.1981). *But see, Bales v. Clarke*, 523 F.Supp. 1366 (E.D.Va.1981).

Defendants argue that congressional silence on durational requirements in the Act should be interpreted as a recognition of the "traditional" nine month school year. This argument makes little sense. First, the nine month school year is a tradition of only recent vintage, if it may even be classified as such. Many states, including Georgia, have had, and may be expected to continue to have, other than nine months of public schooling for non-handicapped children. Second, Congress did not undertake in the Act to delineate *all* substantive considerations that compose an "appropriate education." Indeed, in light of the extraordinarily wide range of physical, mental and emotional impediments that qualify one for special treatment under the Act,[10] Congress could have hardly been expected to specify a uniform school term. Third, Congress has indicated its ability to accommodate special state concerns in the Act. For example, in determining eligibility under the Act, Congress recognized a local practice by making optional the provision of education from the ages of 3 to 5 and 18 to 21.[11]

Had Congress intended to defer to state durational practices as well, there is no doubt it easily could have done so.

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[10] 20 U.S.C. § 1401(1) provides that " 'handicapped children' means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services."

[11] Section 1412(2) provides that a state must demonstrate to the commissioner that the state has developed a plan to assure that "(B) a free appropriate education will be available for all handicapped

Defendants also argue that the Supreme Court's decision in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), mandates rejection of imposing the non-statutory standard of a durational requirement upon the states. In *Pennhurst*, the Court held that Congress did not intend to impose enforceable obligations on states through the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6000, *et seq.* ("DDAA"). The Court reasoned that Congress did not provide for a predicate receipt of federal funds upon compliance with DDAA. The Court forwarded a distinction between statutes enacted under § 5 of the Fourteenth Amendment, which impose absolute obligations upon the states, and statutes drawn under the Spending Clause which may impose unambiguous conditions upon a grant of federal funds. Conditions imposed under the Spending Clause must attach by the terms of the statute to become an enforceable obligation:

> The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract' . . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

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children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to children aged three to five and eighteen to twenty-one inclusive, the requirements of this clause *shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State.*" (emphasis added.)

Pennhurst, 451 U.S. at 17, 101 S.Ct. at 1540 (cites omitted).

[11] Defendants implicitly concede that Congress has the authority under the Spending Clause to impose conditions that attach upon the receipt of federal funds offered under the Handicapped Act. Nonetheless, they claim that a durational requirement was absent from the statute's explicitly required "contract" terms. We disagree. *Pennhurst* is simply inapposite to the situation in the instant case. Defendants confuse the notion of ambiguity with Congress' conscious and clear effort to instill the Handicapped Act with the flexibility necessary to attend to the educational needs of individual children. Congress did not specify the myriad factors which make training for a handicapped child appropriate. There can be no question, however, that a state accepting federal funds under the Act should be fully aware of the requirement of providing individualized education to each handicapped child and of adopting elaborate procedures designed to tailor the state's programs to each particular child's needs. The statute is clear that states will face a loss of federal funding upon a determination by the Commissioner of Education that they have failed to abide by these "contract" terms. 20 U.S.C. § 1413(c). Thus, we can see no reason for not holding a state to these strict procedures once it has accepted federal financial assistance.

B. Section 504 of the Rehabilitation Act of 1973

In addition to premising relief upon the Handicapped Act, the district court granted plaintiffs injunctive relief based upon § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("§ 504"). This statute provides, in pertinent part that

[n]o otherwise qualified handicapped individual in the

> United States, as defined in § 706(7) of this title, shall, solely by reason of his handicap be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or any program or activity conducted by any executive agency or by the United States Postal Service . . .

The district court reasoned that § 504 requires for handicapped children both access to and the provision of the means for enjoyment of the benefits of federal funded programs. The court stated that, "[i]f a child needed a special service to gain equal benefit from his education, the denial of that service would constitute the discrimination in violation of § 504."

Defendants challenge the district court's findings on two grounds. First, they urge that the Handicapped Act establishes a comprehensive federal scheme for the education of handicapped children, thus providing an exclusive remedy for the alleged violation of rights in this case. Second, they contend that even if the Handicapped Act and § 504 remedies are not exclusive, relevant precedent limits of § 504 to insuring equal opportunity and does not permit affirmative remedies such as arguably mandated by the district court.

[12] The contentions of the defendants are unpersuasive. First, the district court correctly interpreted the statutes by holding that remedies offered by the Handicapped Act and § 504 are not mutually exclusive. Defendants rely primarily on the case of *Brown v. General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976) (holding § 717 of Title VII to be the exclusive federal remedy for employment discrimination claims of federal employees), for the proposition that a precisely drawn statute, especially where later-enacted,

preempts general remedies. They argue that allowing plaintiffs to secure relief under § 504 would subvert the carefully crafted internal administrative procedures and the express private right of action offered by the Handicapped Act.[12]

Several cases of the former Fifth Circuit since *Brown* have applied both of these remedies to redress a single level injury.[13] *See S-1 v. Turlington*, 635 F.2d 342 (5th Cir.1981) (expulsion of handicapped students from school without considering whether their misconduct was related to their handicap violated both § 504 and the Handicapped Act); *Tatro v. State of Texas*, 625 F.2d 557 (Fifth Cir.1980) (failure to provide catheterization services for handicapped children violated both § 504 and Handicapped Act); *Camenisch v. University of Texas*, 616 F.2d 127 (Fifth Cir.1980), *vacated as moot*, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981) (deaf graduate student entitled to sign language interpreter services under § 504 without previous resort to administrative remedies). *Accord, Garrity v. Gallen*, 522 F.Supp. 171 (D.D.C.N.H.1982) (both Handicapped Act and § 504 violated by blanket refusal to provide summer services to mentally retarded students); *Pastel v. District of Columbia Board of Education*, 530 F.Supp. 660 (DNH 1981) (Handicapped Act and § 504 create autonomous yet concurrent rights and remedies).

[12] Defendants do not seem to contend that § 504 fails to create a private right of action. The overwhelming weight of appellate court precedence supports such a right. *See Majors v. Housing Authority*, 652 F.2d 454, 455 n. 1 (Fifth Cir.1981). Rather, they challenge the viability of this right of action to redress the same alleged legal injury already considered in a Handicapped Act claim.

[13] The case law of the former Fifth Circuit Court of Appeals has been adopted by the Eleventh Circuit Court of Appeals as binding precedent unless or until overruled or modified by this court sitting en banc. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981).

The *Brown* Court was impressed by legislative history indicating exclusivity, as well as by the balance, completeness, and structural integrity of the statute there in issue. We do not find the factors relied upon by the Supreme Court in *Brown* applicable here. First, the Handicapped Act and § 504 may be available to different plaintiffs. The Handicapped Act is limited to children between the ages of 3 and 21, or depending upon local state practice, between the ages of 6 and 17. Section 504 contains no such limitations. Second, the protections of the Handicapped Act apply only to those programs funded under that statute. Nothing prevents a state from satisfying the educational needs of handicapped children through other available federal programs. Section 504 would apply to such programs, whereas the Handicapped Act by its terms would not. *See Kruelle v. New Castle County School District*, 642 F.2d 687 (Third Cir.1981). We are thus persuaded that § 504 grants independent substantive rights regarding procedures for special educational placement which, when vindicated, allow a court to provide remedies under § 504.

The third reason for finding that § 504 supplements the remedies available under the Handicapped Act is based on a careful reading of the regulations promulgated by the Department of Health, Education and Welfare ("HEW") for implementing § 504 and the Handicapped Act. These regulations are significant because of the need to defer to agency expertise in construing a statute when that agency is charged with the statute's administration. *See NLRB v. Bell Aerospace Company*, 416 U.S. 267, 274-75, 94 S.Ct. 1757, 1761-62, 40 L.Ed.2d 134 (1974); Sands, 21 Sutherland's Statutory Construction § 49.05 at 238 (4th ed. 1973). Significantly, the Handicapped Act regulations were first proposed when the § 504 regulations were in

their final stages of publication. Rather than create remedies supplanting the § 504 regulations, HEW promulgated an administrative scheme intentionally "consistent" with the § 504 regulations. *See* 41 Federal Register 56967 (1976). Moreover, changes to the § 504 regulations as originally proposed clearly indicate that the statutes harbor concurrent rights and remedies. HEW's proposed regulations provided that, "[a] recipient shall establish and implement . . . the procedural safeguards delineated in . . . the Education of the Handicapped Act . . ." *See* 41 Federal Register 30309 (1976). Appendix A of the final § 504 regulations, however, expressly indicates HEW's perception of an independent substantive content to the two statutes:

> Because the due process procedures of the EHA, incorporated by reference in the proposed § 504 regulations are *inappropriate for some recipients not subject to that act*, the section specifies minimum necessary procedures: notice, a right to inspect records, an impartial hearing, a right to representation by counsel, and a review procedure. The EHA procedures remain *one means* of meeting the regulation's due process requirements, however, and are recommended to recipients as a model.

34 CFR Part 104 Appendix A at Page 361 (1982) (emphasis added). *See* 34 CFR Part 104.36 (1982). ***Also see Patsel***, 530 F.Supp. at 64-65.[14]

Defendants finally argue that the § 504 remedy will not support substantial modifications, such as an increase

[14] Those cases finding exclusivity of recovery under the Handicapped Act and § 1983, *see e.g. Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981), present a somewhat different issue because § 1983 stands alone, devoid of the well developed administrative procedures attendant § 504 regulations. *See Tatro v. State of Texas*, 516 F.Supp. 968 (N.D.Tex.1981). To the extent such cases are inconsistent with our holding, we reject their analysis.

in the length of the school year, because the statute was intended to provide equal opportunity of benefit and does not require affirmative action. They suggest that § 504 merely outlaws the discriminatory denial of services to handicapped children under a federally assisted statute. Defendant's argument is predicated on the Supreme Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979). In *Davis*, a deaf woman was denied individual affirmative assistance necessary to make a college nursing program accessible to her. The Court found that the school was not required to incur undue financial or administrative burdens by making substantial adjustments in its existing programs to admit the woman. The Court reached this result, however, by construing the phrase "otherwise qualified handicapped person" in § 504 to mean one who is able to meet all of a program's requirements "in spite of," rather than except for, his or her handicap, 442 U.S. at 406, 99 S.Ct. at 2367. The Supreme Court concluded that Davis was not otherwise qualified because she could never benefit from the school's program. Davis' handicap prevented her from safely performing in both her training program and her proposed profession.

[13] Given the basis for the Supreme Court's holding in Davis, we do not find that it bars § 504 relief for the plaintiffs. In *Camenisch* this Court interpreted the scope of the Supreme Court's decision in *Davis* in a highly limited fashion. There we stated, "The Supreme Court's decision in *Southeastern Community College* says only that § 504 does not require a school to provide services to a handicapped individual for a program for which the individual's handicap precludes him from ever realizing the principal benefit of the training." *Camenisch*, 616 F.2d at 133. *Camenisch's* limited reading of *Davis* was relied upon

by the former Fifth Circuit in *Tatro* as well, 625 F.2d at 564. We have no doubt that the plaintiffs would benefit from the extended programming under consideration. Moreover, we do not believe that even year round schooling, the most comprehensive substantive relief available to the plaintiffs, would constitute a change in the *scope* of services as envisioned by *Davis*. The Supreme Court in *Davis* recognized that, "the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will [not] be clear . . . ." 442 U.S. at 412, 99 S.Ct. at 2370. Here we conclude that due to § 504's broad recognition of the impermissibility of the "denial" of "benefits," the district court did not err in finding that defendants' actions fall without the bounds of the law.[18]

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[18] The United States, invited to file a brief as amicus curiae has blown hot, cold and hot as to the coverage under Section 504. In a brief filed in the district court, the Department stated that "under existing regulations implementing EHA-B (34 CFR 300.300) *and section 504* . . . state rule or policy that imposes time limitations on the provision of services to handicapped children precludes an individual determination of each handicapped child's unique needs for services." Notice published 45 Fed. Reg. 85083, Dec. 24, 1980. (emphasis added).

In a brief amicus filed since oral argument, the United States says:

> Careful review of the Section 504 issue has led us to conclude that our position in the district court—that the 180 day policy violated Section 504—was erroneous.

Most recently, counsel for appellees has provided us with a copy of a recent Memorandum, from the assistant secretary for civil rights of the Department of Education, dated May 24, 1983, which concludes with the statement:

> We have concluded that a recipient which categorically excludes consideration in its evaluation and placement procedures of any nonmedical service, including extended school year or extended school day services, violates Section 504 and its accompanying regulation at 34 C.F.R. § 104.33(a).

This last word from the Department, of course, supports the views we have expressed above.

VII. Issues on Cross Appeal

Plaintiffs assert two bases for reversal on cross appeal. First, they claim that the district court, in declining to issue individual injunctions explicitly requiring more than nine months schooling for certain plaintiffs, applied the wrong legal standard under the Handicapped Act. Plaintiffs argue that the district court applied an "irreparable injury" standard rather than the "preponderance of the evidence" standard for *de novo* review specified in § 1415 (e)(2).

Plaintiffs are correct in emphasizing the importance of the Handicapped Act's preponderance of the evidence standard. The court in *Campbell v. Talladega County Board of Education*, 518 F.Supp. 47, 53 n. 9 (W.D.Ala. 1981), explained that:

> The preponderance of the evidence standard codified at 20 U.S.C. § 1415(e)(2) reflects a decision to accord a greater rule in the enforcement scheme to the federal courts. The original House version which provided that the determination of the state agency would be "conclusive in any court of the United States supported by substantial evidence" was rejected by the conference committee and the present language was substituted. Senate Report Number 455, 94th Congress, 1st Session 47-50 (1975), *reprinted in* [1975], U.S.Code Cong. & Ad.News 1480, 1500-02.

[14] Despite this importance, plaintiffs' argument is unavailing on two accounts. First, the "irreparable injury" standard for injunctions is not a standard of persuasion, but a substantive requirement dictating the content of the proof that will be found probative. There would be nothing inconsistent in finding "irreparable injury by a

preponderance of the evidence."[16]

[15] Second, the court's requirements that local school boards carry the burden of determining need in the first instance and that they must give full consideration to the merits of educational placement for longer than 180 days comport with the wide discretion the statute affords a district judge in granting relief. The Handicapped Act provides that the judge, "shall grant such relief as is appropriate." 20 U.S.C. § 1415(e)(2). The court has no obligation under this section to rule on the merits of an individual IEP. The district court's refusal to grant the individual injunctions, while at the same time prohibiting exercise of the state and local defendants' general policy on duration, is the type of creative remedy permitted by the statute.

[16] Plaintiffs would also have us find the district court's injunction, prohibiting the defendants' across the board policy, insufficiently specific under Federal Rule of Civil Procedure 65(d).[17] Plaintiffs complain that the injunction offers no criteria by which to measure the compliance of the defendants. In light of the elaborate procedural requirements of the Handicapped Act, and the discretion

[16] The District Court's otherwise well thought out and documented findings, while not a model of clarity on this particular issue, seems to conform to the notion discussed in the text. The court stated, "Overall, the evidence presented was not conclusive enough to justify the issuance of the mandatory injunction [for the individual plaintiffs]."

[17] Federal Rule of Civil Procedure 65(d) provides: "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

traditionally accorded the grant of equitable remedies, we do not find the injunction inadequate. Nothing prevents the plaintiffs from seeking further relief from the district court if the defendants fail to comply in good faith with the requirements of the injunction and the applicable federal standards.

The judgment of the district court is therefore AFFIRMED.

JAMES C. HILL, Circuit Judge, dissenting.

I respectfully dissent from the judgment in this case affirming the district court not because the judgment may not result in a proper and appropriate educational opportunity for the appellee and those in the class, but because, in my view, neither the district court nor this court is constitutionally entitled to, or under a duty to, decide the issue.

I have carefully studied the provisions of the Education for All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.* While it contains a number of provisions, nowhere does it amount to legislation by the Congress on the issue seen as confronting the nation. It describes the problem which might cryptically be stated as the unsatisfactory educational opportunities found to be available to handicapped children. In a number of provisions, it announces that these handicapped children should have an "appropriate" education. It appears to me that the legislative branch, acknowledging the existence of a serious problem, has acknowledged that the solution to it should be the "appropriate" solution. This is not legislation; it is not even news! It goes without saying that when the Congress is confronted with a problem facing the country and feels that governmental intervention is necessary, the law to be passed should be an appropriate law.

In the Handicapped Act, a structure is created looking towards the determination, by some institution (not the Congress), of what an appropriate solution to the problem might be. Thus, the states which care to avail themselves of the financial resources provided by the law are required to establish plans that assure all handicapped children a "free appropriate public education." 20 U.S.C. § 1412. These plans are to be submitted to the then Commissioner of Education, now the Secretary of Education, for approval before any funds are to be made available to the state. 20 U.S.C. § 1413. If the Commissioner of Education should approve a plan providing for educational opportunities for the handicapped less than what might be found appropriate, no provision is made for an appeal. If the Commissioner refuses to approve a plan contended by the state to provide for appropriate educational opportunities, the state can appeal to the circuit court of appeals. 20 U.S.C. § 1416(b)(1).

Whether or not any of these procedures created by the congressional delegation to the agencies and the states results in an appropriate education for a handicapped child cannot be determined by reference to any of the provisions of the law passed by the Congress. Indeed, it cannot be determined by reference to any of the regulations established by the Commissioner in exercising the Commissioner's delegated authority. When all is said and done, if a citizen be dissatisfied with the education to be offered to a handicapped child, the entire matter is to be decided, de novo, by a United States district judge. 20 U.S.C. § 1415(e). What the district judge is required to do, if the Congress may delegate this power and responsibility to the district judge, is to determine, on a case-by-case basis, what is the "appropriate" answer to the problem seen by the Congress to confront the country.

As I view the Handicapped Act and the regulations, it appears that no branch of the politically responsive branches of government has yet been willing to provide the appropriate answer to the compelling problem. Although there are many provisions in the law, the Congress and the Department of Education take the position that the ultimate making of the law as to any particular state shall be that which a district judge deems to be an appropriate law. Nevertheless, the legislative branch cannot delegate or confer legislative power on the courts or impose legislative duties upon them because such duties are not judicial in nature. *See, e.g., National Mutual Insurance Co. v. Tidewater Transfer Co., Inc.*, 337 U.S. 582, 590-91, 69 S.Ct. 1173, 1177, 93 L.Ed. 1556 (1949); *Kilbourn v. Thompson*, 103 U.S. 168, 190-91, 26 L.Ed. 377 (1880).

The separation of powers created by our finely-tuned constitutional system of government is offended when the legislative branch undertakes to abdicate its sometimes most difficult tasks to the judicial branch. If that willingness on the part of the legislative branch to abdicate is met by a willingness on the part of the judicial branch to accept inappropriate power and responsibility, the system of government in this country is, to that extent, eroded.

I am aware that in *Board of Education v. Rowley*, ___ U.S. ___, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), the Court determined what is generally meant by the Handicapped Act's requirement of a "free appropriate public education." My review of the case and the briefs, however, indicates that the constitutionality of the Act's delegation of legislative authority to district courts was not raised by the parties or considered by the Court. Here

also, no party litigant attacks the constitutionality or advisability of this attempt on the part of the Congress to pass over to the judiciary the difficult task of creating an appropriate law in this area. If it were attacked by the appellee and the class, it would jeopardize the funds to be used for the education of those so situated. If it were attacked by the local board of education or the State, the funds to administer the program would be in jeopardy. The Department of Education has represented to this court that it is quite comfortable with the law being made by the judiciary. Thus, all of the parties are satisfied that the legislative function in this difficult area be handled by the one branch of government not responsive to the electorate—the judiciary.

Unless those working in the judicial branch shall be, sua sponte, sensitive to this breach of the separation of powers, legislative activity will be exercised by the branch least appropriate to its exercise, not by virtue of any usurpation or "power grab" on the part of the courts, but by virtue of a willing abdication of this "hot potato" by the Congress and the executive. It has long been recognized that a federal court must on its own motion ascertain its jurisdiction and I apprehend that the same rule applies to the court's ascertainment of its power to act under Article III, Section 2 of the Constitution. That Article III judicial power extends to all cases arising under the laws of the United States but does not extend to the resolution of debates as to what the law of the United States ought to be—even though the legislative branch, charged with that responsibility and given that power to make the law, might invite the court so to act.

Inasmuch as I feel this delegation to be unconstitutional, I should, on that basis, vacate the judgment of

the district court and remand the case to the district court for dismissal, the question presented being within the domain of the Congress as established by Article I of the Constitution and beyond the jurisdiction estab lished by the Constitution for Article III courts.

DISTRICT COURT'S ORDER ON CLASS CERTIFICATION AND PRELIMINARY INJUNCTION

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIA ASSOCIATION OF RETARDED CITIZENS, et al.,
Plaintiffs,
v.
DR. CHARLES McDANIEL, et al.,
Defendants.

Civil Action No. C78-1950A

ORDER

This civil action for injunctive and declaratory relief arises under the Education for All Handicapped Children's Act, 20 U.S.C. § 1401, *et seq.*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Fourteenth Amendment to the Constitution of the United States, and the Adequate Program for Education in Georgia, *Ga. Code Ann.* Ch. 32-6A. Jurisdiction is invoked pursuant to 20 U.S.C. § 1415(e)(4), 28 U.S.C. § 1343(3) and (4), and 28 U.S.C. § 1337. Presently before the Court are the motions by the named plaintiffs for class certification and for a preliminary injunction.

The named plaintiffs are the Georgia Association for Retarded Citizens, Russell Caine, a mentally retarded minor, and L. Douglas and Virginia Caine, Russell's parents. Defendants are the State Superintendent of Schools, the State Board of Education, and its members (the "State Defendants"), the Savannah-Chatham Board

of Education and its Superintendent and members (the "Local Defendants"). Plaintiffs have alleged that defendants have refused and failed to provide a free appropriate public education to handicapped mentally retarded children whose unique and special needs require a program of education and related services of a duration greater than the present 180-day school year.

I

The Education for All Handicapped Children's Act, 20 U.S.C. § 1401, *et seq.*, (hereinafter "the Act"), provides a procedure for determining a "free appropriate public education." This procedure includes the requirements of identifying potentially handicapped children, evaluating such children's needs and capabilities, planning and programming to meet those specific needs, and providing a due process mechanism to contest such evaluations or educational programs.

The Act defines a "free appropriate public education" as a program of,

> [S]pecial education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the state educational agency, (C) including an appropriate pre-school, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under 61414(a)(5) of this Title. 20 U.S.C. §1401(18). *See also* 20 U.S.C. §1412(1); 20 U.S.C. §1414(a)(1)(C)(ii); and 45 C.F.R. §121a.2.

The Act then defines "special education" in the following fashion:

> The term "special education" means specifically designed instruction, at no cost to parents or guardians,

to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions. 20 U.S.C. §1401(16).

The Act goes on to define "related services" as meaning:

Transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children. 20 U.S.C. §1401(17). *See also*, 45 C.F.R. §121a.14.

The fourth basic operational definition within the Act is the definition of "individualized education program." The Act defines the IEP as a

[W]ritten statement for each handicapped child developed in any meeting by a representative of the local educational agency . . . who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and whenever appropriate the child, which statement shall include (A) a statement that present levels of educational performance of such child, (B) a statement of annual goals, including short term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved. 20 U.S.C. §1401(19). *See also*, 20 U.S.C.

§1412(4), (6); §1414(a)(5); 45 C.F.R. §§121a.340-349.

To determine the needs of each child on an individual basis, so that a "free appropriate public education" may be provided each handicapped child, the Act requires a full and individual evaluation of each child's educational needs. 20 U.S.C. §1412(5)(c) and 45 C.F.R. §121a.531. The evaluations are then reviewed by an interdisciplinary team which must obtain information from the child's parents and other persons with knowledge of the child. The team must assess whether a child is handicapped under the Act and whether it must proceed with the development of an IEP. 20 U.S.C. §1412(5)(c) and 45 C.F.R. §121a.533. If an IEP is developed, it must contain, *inter alia*, long term and short term goals for the child and evaluation of his current level of functioning. This assessment then becomes the basis of the child's educational program and must be reviewed at least annually and revised as appropriate. 20 U.S.C. §§1412(4) and (6), §1414(a)(5), and 45 C.F.R. §121a.343(d).

In the instant case, Russell Caine's IEP called for the usual 180 days of programming over the strenuous objection of his parents. This action is, in part, an appeal from the decision of the State and Local defendants not to provide Russell more than 180 days of programming.

II

Certification of two separate classes is sought in this action. Plaintiffs Georgia Association for Retarded Citizens ("GARC") and Russell Caine, through his parents and next friends, L. Douglas Caine and Virginia Caine, seek to represent a class of persons composed of all handicapped children of school age in the State of Georgia who are mentally retarded, and who, because of their special

needs, require more than 180 days of public school programming of special education and related services. Plaintiffs GARC, L. Douglas Caine and Virginia Caine seek to represent a class of persons composed of the parents or guardians of all handicapped children of school age in the State of Georgia who are mentally retarded, and who, because of their special needs, require more than 180 days of public school programming of special education and related services.

Prior to certification of this lawsuit as a class action, the Court must initially find that each of the prerequisites set out in Fed.R.Civ.P. 23(a) is met. Rule 23(a) provides as follows:

> Class Actions. (a) Prerequisite to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

A

It is undisputed in the instant case, and the Court finds, that the named individual plaintiffs are members of the classes they seek to represent. *See Bailey v. Patterson*, 369 U.S. 31 (1962). Plaintiff Russell Caine is a handicapped, mentally retarded child in need of more than 180 days of special educational and related services. Plaintiffs L. Douglas and Virginia Caine are his parents. The membership of GARC includes retarded children similarly in need of more than 180 days of special educational and related services and their parents. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976).

The Court further finds without objection from the defendants that the putative class is so numerous that joinder of all members is impracticable. "Impracticable," as it is used in the rule, means impractical, unwise or imprudent rather than incapable of performance or infeasible. *Republic National Bank of Dallas v. Denton & Anderson*, 68 F.R.D. 208 (N.D. Tex. 1975). In Georgia, there are 31,173 mentally retarded children, 313 of whom are Profoundly or Severly Mentally Retarded (hereinafter "PSMR"), the classification in which Russell Caine is found. The Court finds that it is the PSMR children who are most likely to require more than 180 days of services and infers from the total number of PSMR children in Georgia that the number of children and parents in each class would preclude joinder as a practical alternative. *See Senter v. General Motors Corp.*, 532 F.2d 511, 523 (6th Cir. 1976).

B

While the defendants have not objected to class certification on the above issues, the State defendants have attacked the class definitions as being so imprecise as to make the classes unascertainable. The State defendants cite several cases which stand for the proposition that class certification is inappropriate where a separate adjudication by the Court would be necessary to determine an individual's class membership. *E.g. Ihrke v. Northern States Power Company*, 459 F.2d 566 (8th Cir. 1972); *Metcalf v. Edelman*, 64 F.R.D. 407 (N.D. Ill. 1974). However, the Court finds these cases inapposite to the instant case where the initial determination of which handicapped, mentally retarded children require more than 180 days of special educational and related services is made administratively. While appeal from this administrative

process may ultimately be had to this Court, this Court does not find the potential review of some administrative decisions under these circumstances equivalent to the necessarily separate adjudications which foreclosed class certification in the cases cited by the State defendants.

In a similar vein, this Court finds State Defendants' reliance on *Burnham v. Department of Public Health of the State of Georgia*, 349 F. Supp. 1335 (N.D. Ga. 1972) misplaced. In *Burnham* the "class" purported to be patients at state mental institutions receiving constitutionally inadequate diagnosis, care and treatment. In that case, the Court rejected certification of the class because adequacy of treatment can only be measured against the needs of a particular patient. *Id.* at 1343. In the instant case, the Court is again confronted with a class contention of inadequate treatment, i.e., denial of a "free appropriate public education." However, in this case, the administrative agency charged with providing the education is also charged with determining each individual's needs with respect tc that education. Therefore, the Court is not directly faced here with determining what is an appropriate education on an individual basis, but with preventing the arbitrary denial of what has been administratively determined to be appropriate or, in another setting, with preventing an arbitrary and capricious determination by the administrative agency.

C

In demonstrating the commonality of factual or legal issues, it is not necessary that all questions raised in a lawsuit be common to all members of the class. *Like v. Carter*, 448 F.2d 798 (5th Cir. 1971). To satisfy Fed.R. Civ.P. 23(a)(2), the Court need only find that common questions exist.

In the instant case, common questions of fact exist for each class pertaining to the defendants' alleged policy regarding more than 180 days of programming. Common questions of law include a determination of what constitutes an "appropriate" education and whether the State or local Boards are responsible for provision of extended services if they are needed to meet a handicapped child's unique needs. Thus the Court finds questions of law and fact common to the named plaintiffs and the putative class.

D

As noted above, the claims of the representative party must be typical of the claims of the class. Fed.R.Civ.P. 23(a)(3). A class plaintiff is typical of the class within the meaning of Rule 23(a)(3) if he does not have interests which conflict with those of the class, and his claims for relief are based on the same legal or remedial theory as other class members. *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973) (fn.7). In the instant case, the claims of the plaintiffs representing each putative class are based on the same legal theories. The State defendants' contention that the uniqueness of each individual child's training and educational requirements precludes typicality misses the point here.

E

The final prerequisite to a class action is a determination by the Court that the representative parties will fairly and adequately protect the interests of the class. Fed.R.Civ.P. 23(a)(4). Whether a plaintiff may be said adequately to represent a class depends on the lack of antagonistic interests between the named plaintiff and the class, as well as the named plaintiff's willingness and

ability vigorously to protect the interests of the class. *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973). Further, the named plaintiffs must have competent counsel who is willing and able to protect the interests of the class. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968).

In the instant case, there appear to be no antagonistic interests between any of the named plaintiffs and the classes they purport to represent. The Court finds the plaintiffs to have demonstrated their willingness and ability to protect the interests of the class. The Court finds further, on the basis of plaintiffs' counsel's submission of prior experiences in other class action litigation that plaintiffs' counsel is competent, willing and able to protect the interests of the classes here seeking certification.

F

Class certification is sought on behalf of each class under Fed.R.Civ.P. 23(b)(2) which provides:

> (b) Class Actions Maintainable. Any action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . .

In the instant action, plaintiffs allege that the defendants have a policy which limits the special educational and related services in non-institutional settings to 180 days each year. Implementation of this policy allegedly results in the denial of an "appropriate" education to the plaintiffs and the members of the classes they seek to represent. Such implementation constitutes an act, or refusal to act, depending on one's perspective, on grounds

generally applicable to the class. Should the Court find these allegations substantiated, the instant action would certainly be one appropriate for injunctive or declaratory relief with respect to each of the purported classes.

In sum, this Court finds with respect to each putative class, that the instant action satisfies the prerequisites of Fed.R.Civ.P. 23(a) and qualifies for maintenance as a class action under Fed.R.Civ.P. 23(b)(2).

III

It is clearly established that precedent to a grant of preliminary injunctive relief by this Court, the plaintiffs must demonstrate the following: (1) a substantial likelihood that plaintiffs will prevail on the merits, (2) a substantial threat that plaintiffs will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiffs outweigh the threatened harm the injunction may do to the defendants, and (4) that granting the preliminary injunction will not disserve the public interest. *Morgan v. Fletcher*, 518 F.2d 236 (5th Cir. 1975); *Canal Authority of State of Florida v. Calloway*, 489 F.2d 565 (5th Cir. 1974). For the reasons outlined below, the Court finds that plaintiffs have not met each of these prerequisites.

A

To meet the special needs of Russell and the members of the class he represents here, plaintiffs allege that educational services must be provided for more than 180 days per year. Many of these children have a developmental age of a normal child two to three years old. They may not be toilet trained; they may require assistance in walking beyond a few steps; they may have trouble feeding or dressing themselves. The educational program

sought to be extended here is directed towards increasing these self-help skills and improving the children's ability to function in a group or, in other words, socialize.

Whenever there is a break in the training of these children, they tend to regress resulting in a loss of progress in the acquisition and generalization of these basic skills. It is this regression on which plaintiffs rely to establish their injury in seeking preliminary injunctive relief. However, this Court finds that the likelihood, evidenced by expert testimony presented by both the plaintiffs and defendants, that the skills lost through regression are generally recoverable within a reasonable time vitiates plaintiffs' argument that such injury is irreparable. The fundamental lack of evidence available with respect to the nature and extent of regression and the peculiarities of the problem for each child complicate this issue immensely. However, the record before the Court does not demonstrate the substantial threat of irreparable injury necessary before the Court may grant the requested relief.

B

The Court finds further that, at this late date, it would disserve the public interest to grant the preliminary injunction. The Local defendants estimate that it would take several weeks to structure, staff and implement an extended program for members of the class Russell represents. To require immediate provision of special educational and related services to children in the class would greatly disrupt the defendant organizations without necessarily providing concomitment benefits to the plaintiffs. *See generally Gomperts v. Chase*, 404 U.S. 1237 (1971).

IV

ACCORDINGLY, plaintiffs' motion for class certifica-

tion is granted. Plaintiffs GARC and Russell Caine, through his parents and next friends, L. Douglas Caine and Virginia Caine, are certified to represent a class of persons composed of all handicapped children of school age in the State of Georgia who are mentally retarded, and who, because of their special needs, require more than 180 days of public school programming of special education and related services. Plaintiffs GARC, L. Douglas Caine, and Virginia Caine are certified to represent a class of persons composed of the parents or guardians of all handicapped children of school age in the State of Georgia who are mentally retarded, and who, because of their special needs, require more than 180 days of public school programming of special education and related services. Plaintiffs' motion for preliminary injunction is denied.

SO ORDERED, this the 11th day of July, 1979.

/s/ HAROLD S. MURPHY
UNITED STATES DISTRICT JUDGE

DECISION OF THE DISTRICT COURT

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIA ASSOCIATION OF RETARDED CITIZENS, et al.,
Plaintiffs,
v.
DR. CHARLES McDANIEL, et al.,
Defendants.

Civil Action No. C78-1950A

MEMORANDUM OPINION

I. Introduction.

A. Description of the Case.

This is a class action lawsuit to redress an alleged deprivation of rights under the Education for All Handicapped Children Act ("Handicapped Act"), 20 U.S.C. §1401 *et seq.;* Section 504 of the Rehabilitation Act of 1973 ("Section 504"), as amended, 29 U.S.C. §794; the Equal Protection and Due Process Clauses of the Fourteenth Amendment; the Adequate Program for Education in Georgia Act, *Ga. Code Ann.* § 32-601a *et seq.;* and the Georgia Constitution. This court's jurisdiction is invoked pursuant to 20 U.S.C. §1415(e) and 28 U.S.C. §1343.

The named plaintiffs are the Georgia Association of Retarded Citizens ("GARC"), a nonprofit statewide organization created to promote the interests of mentally retarded citizens of all ages; Russell Caine, a profoundly mentally retarded child; and L. Douglas and Virginia Caine, Russell's parents. The defendants are the State

Superintendent of Schools, the State Board of Education, and the individual members of the State Board of Education ("state defendants"). Also named as defendants are the Superintendent of the Savannah-Chatham School System, the Savannah-Chatham Board of Education, and the individual members of the Savannah-Chatham Board of Education ("local defendants").

In essence, plaintiffs contend that defendants have policies or practices of refusing to consider the needs of mentally retarded children for educational terms in excess of the traditional 180-day school year. They contend that Russell Caine and certain other identified members of the class have shown a need for such additional schooling but that defendants, pursuant to their policies and practices, have refused to provide it. It is plaintiffs' position that these policies and practices of the defendants violate the rights of the plaintiffs under the Handicapped Act, as well as violating their rights under Section 504, the United States Constitution, and state law. They seek injunctive relief against the continued application of the policy and a mandatory injunction requiring the provision of extended school years to the named plaintiffs and certain other members of the class. Plaintiffs also seek a declaratory judgment pursuant to 28 U.S.C. §2201 that the policies of the defendants violate the above-cited statutory and constitutional provisions.

The defendants, on the other hand, contend that they have no policy or practice precluding consideration of a child's need for education beyond the traditional 180 days. They argue that the named plaintiffs and other identified members of the class have shown no need for an extended school year, and that in any event, the Handicapped Act does not require them to provide any more

than 180 days of schooling. Defendants have filed a motion for judgment on the pleadings as to all of plaintiffs' claims other than the claim under the Handicapped Act. The local defendants have additionally filed a motion to dismiss the individually named defendants as parties to this action and, with the state defendants, motions to redefine the class.

B. **History of the Case**

This matter was initiated in early 1978 by Mr. and Mrs. Caine's appeal of a decision by the local school board denying their request that the school system provide Russell with a 12-month educational program. An administrative hearing was held before the Chatham County Hearing Review Board on April 18, 1978, and the Caines subsequently received an adverse decision. The parents timely appealed to the State Board of Education in May of 1978, and the State Board ruled against them in October, 1978. The Caines then filed this action for review pursuant to the Handicapped Act in November of 1978, joining other legal and factual issues. In June, 1979, an evidentiary hearing on plaintiffs' motion for preliminary relief and for class certification was held before the Honorable Harold Murphy of this court.

Judge Murphy denied the plaintiffs' motion for preliminary relief the following month on two grounds. The court found that plaintiffs had not demonstrated so substantial a threat of irreparable injury as to merit the entry of preliminary relief, and also that a preliminary injunction would disserve the public interest. In that same order, Judge Murphy certified this matter as a class action on behalf of two separate classes. The first class was defined as follows: "All handicapped children of school age in the state of Georgia who are mentally re-

tarded, and who, because of their special needs, require more than 180 days of public school programming of special education and related services." Members of this class, whose parents testified at the trial, include—other than Russell Caine—Christopher Hodgson, Keith Jenny, and Anthony Jackson, all severely mentally retarded children from Chatham County. The second class was composed of the parents or guardians of all children in the first class.

Following transfer of the case to this judge, it was tried without a jury in the summer of 1980. Requiring three (3) weeks of testimony, the trial produced approximately 30 witnesses, many of whom were experts, and thousands of pages of exhibits for the court's consideration. The matters in dispute are highly emotional and were hotly contested by both sides.

C. **Issues Presented**

The central issue raised by this action is whether Russell Caine, a profoundly mentally retarded child, and other members of the class he represents are entitled to be considered for or to receive more than 180 days of free public education in order for the state appropriately to meet its obligations under applicable federal and state statutes. In order to decide this question, the court must consider several more specific issues, the most important of which are the following: (1) whether the local and state defendants, or either of them, maintain a policy or practice of failing to consider or provide for the needs of mentally retarded children for education in excess of 180 days per school year; (2) whether, if the policy or practice is found to exist, it violates applicable federal or state statutes; and (3) whether the evidence shows that the named plaintiff or other members of the class suffered a sufficient

degree of regression or other detrimental effects from the breaks in educational programming to demonstrate a need for an extended school year. The court must also determine whether the Handicapped Act and Section 504 can both be applied in this action, and consider the applicability of the other statutory and constitutional provisions alleged to have been violated.

II. Findings of Fact

A. Background

Mental retardation is a condition in which an individual's intellectual functioning skills are substantially below those of an average person of the same age. The degree of mental retardation can vary from the mildly or educably mentally retarded, whose intelligence quotients range between 70 and 50 and who may become independent, productive members of society, to the profoundly or severely mentally retarded ("PSMR") whose I.Q.'s are generally below 30 and who may have to be fully supervised for their entire lives. Many mentally retarded children lack basic living skills and have physical handicaps as well. This is more likely to be true the greater the degree of mental retardation, and particularly common with PSMR children. Plaintiff Russell Caine and the members of his class identified above are PSMR children.

Because of community fears and a belief that they could not be educated, mentally retarded children were historically excluded from the public schools in Georgia and the rest of the United States. Many were institutionalized for their entire lives. Even though the treatment of the mentally retarded improved with time, early school programs providing services for the mentally retarded still did not include the PSMR child. When school-

like services were finally provided for PSMR children, it was in the form of year-round segregated training centers which fell below the standards of public schools in many respects. In Chatham County, the St. Johns Training Center was operated by the Chatham Association for Retarded Citizens with the financial support of the Georgia Department of Human Resources to provide services for PSMR children on a year-round basis.

Judicial decisions in the early 1970's recognizing the rights of the mentally retarded to receive the benefits of public education led to the passage of major legislation to remedy the problem.[1] This legislation included Section 504 and the Handicapped Act. The Handicapped Act, 20 U.S.C. §1401 *et seq.*, is a funding statute to assist states in providing a free appropriate education to all handicapped children, and has several requirements for states receiving funds under it. Section 504, codified at 29 U.S.C. §794, prohibits discrimination against handicapped persons in all programs receiving federal financial assistance.

The state and local defendants in this action are recipients of funds under the Handicapped Act and therefore subject to its provisions and the provisions of Section 504. 20 U.S.C. §1413 requires any state desiring to receive the Handicapped Act funds to submit to the Commissioner of Education a "state plan" implementing an educational program for handicapped children. Requirements for those plans are also specified in §1413.

Georgia's State Board of Education submitted state plans to the United States Commissioner of Education to qualify for funding for fiscal years 1978-79 and 1979-80. The Bureau of Education for the Handicapped, a division of the United States Office of Education, approved

Georgia's state plans and allowed the state to receive funding for the aforementioned fiscal years. Georgia's state plans do not require local school systems to provide educational services for the mentally retarded in excess of the traditional nine month school year, but apparently do not prohibit the provision of such extended educational services. As will be more fully discussed below, the state defendants have taken the position that their policy regarding the provision of schooling in excess of 180 days is "permissive," that is, they will allow a local agency to provide excess schooling if the local agency so desires. The evidence reveals only one local educational agency which routinely provides more than 180 days of schooling for its mentally retarded children. The Board of Education of Douglas County, Georgia, provides a summer program for mentally retarded students based on the children's Individual Education Programs ("IEPs").[2] The Savannah-Chatham school district, like the other local educational agencies, only has 180-day programs.[3]

The Exceptional Children's Center ("ECC") has been operated by the Savannah-Chatham County School System for the past two years to provide services for mentally retarded children. There is general agreement that the quality of programming provided by ECC during the nine months that it is in service is quite good. The evidence revealed that the local defendants spend significantly more money per pupil for the students at ECC than for the normal children in the school system, and that the teacher-pupil ratio is approximately one to one. Although the plaintiffs admit that the quality of instruction at ECC is good, they argue that it should be extended to more than 180 days in duration.

B. **The 180-Day Policy**

1. **Local Defendants**

The local defendants contend that they have never had an express or implied policy prohibiting the consideration of whether a PSMR child's unique needs require more than 180 days of schooling. They state that when devising an individual education program for a particular child, the needs of the child for year-round programming are indeed considered. It is their position that if a child were found to need an extended program, his IEP would reflect it and an extended program would be recommended. After careful consideration of this matter, the court concludes that the evidence belies these contentions.

No PSMR child has ever been found by the local defendants to require more than 180 days of school, and consequently, no program has ever been developed for a PSMR child to receive more than the traditional 180 days. Although it is possible that none of the children would require a year-round program, it is likely that if full consideration had been given to each child's need, at least some of the children would have been found to require some amount of education beyond the traditional nine months. The fact that all of the PSMR children in the Savannah-Chatham school district were uniformly found to require only 180 days of school indicates that the educational needs of these children were considered in the context of the amount of schooling available to them, 180 days, rather than in light of what would be required to achieve reasonable educational objectives.

Furthermore, in the local defendants' answers to the plaintiffs' first interrogatories the local defendants stated that "the Savannah-Chatham Public School System provides educational programs for all students for 180 days." That answer was given in response to Interrogatory #14

which asks whether the local defendants have any policy on the duration of educational services provided mentally retarded children. Also in response to Interrogatory #14, the local defendants quote the following provision of Policy No. 0971, adopted June 21, 1978: "The school year will consist of 180 actual attendance days for the students." The local defendants' response to Interrogatory #14 indicates that, at the time the interrogatories were answered, they had a policy limiting the school year for mentally retarded children to 180 days.

Additional evidence of the existence of a policy is found in the decisions of the local defendants in cases where the parents of mentally retarded children requested school years in excess of 180 days. The local defendants' refusals of these requests were grounded in the fact that the state only funded 180 days, and therefore that was all that would be provided. The needs of a child were in no instance articulated as the reason for refusing the request for an extended school year, only the lack of funding. In fact, the Chatham County Hearing Review Board (not a part of the Chatham County Board of Education), in its ruling on Russell Caine's appeal from the adverse decision of the local board of education, found that although there was some evidence of Russell's need for an extended school year, the 180 days provided was adequate because that was all that was required under state law.[4] The fact that the local defendants refused requests for extended school years because the state only required and funded 180 days indicates that the local defendants had a policy or practice of refusing to consider the needs of a child beyond 180 days.

None of the parents who testified at trial indicated that they had been told that their child did not require in excess of 180 days, or that their child had been considered

for schooling in excess of 180 days. It seems likely that if the local defendants did in fact consider each child's needs for a year-round program, there would have been some discussion of this consideration with the parents, particularly if it had been found that their child did not require more than 180 days of schooling. This failure to articulate to parents the fact that their children had been found not to require more than 180 days of school or that their children had been considered for more than 180 days indicates that there had been no such finding or consideration.

In light of the evidence discussed above, the court concludes that the local defendants did have a policy or practice of refusing to consider or provide for a mentally retarded child's educational needs beyond 180 days.

2. State Defendants

The state defendants contend that their policy regarding the provision of an extended school year for mentally retarded children is permissive. They argue that while the federally approved state plans under the Handicapped Act do not require local school systems to provide more than 180 days, local school systems are not prohibited from doing so and may provide extended school years if they desire. After careful consideration, the court concludes that the contentions of the state defendants are not borne out by the evidence.

The State Board of Education, as an appellate body in cases in which parents appealed the denial of extended school years by local boards, has never ordered a local board to consider a student's needs beyond 180 days or to provide in excess of 180 days for any student. In most of the cases that were appealed the State Board simply adopted the recommendation of the hearing officer, which was often based on the fact that there was no legal require-

ment that local boards pay for education in excess of 180 days.[5] In fact, there was some testimony that the State Board even instructed the hearing officers that they had no authority to order more than 180 days.[6] At any rate, in very few of these cases was there any discussion of whether or not the children needed more than 180 days of school.[7]

Under the Handicapped Act, the state defendants have a duty to make sure that local educational agencies receiving funds under it provide an appropriate education for handicapped children.[8] In monitoring the plans and programs of local educational agencies, the state defendants do not require the local boards to consider the need for schooling in excess of 180 days, or to provide it if needed. In fact, the state defendants have informed the local defendants that they need not consider whether a child needs schooling in excess of 180 days.[9] The evidence indicated that the state defendants have made clear their position that if any local educational agency determines that a child is in need of an extended school year, that local agency will be responsible for providing for the cost of the school year to the extent that it exceeds 180 days.[10]

It is apparent that although the state defendants' policy does not expressly prohibit the consideration or provision of an extended school year, it has that effect. If any local educational agency were to find that a child needed schooling in excess of 180 days, that local agency would have to bear its cost alone. The specter of having the responsibility for such a financial burden without any expectation of assistance might very well deter local educational agencies from considering the needs of handicapped children for schooling in excess of 180 days. In addition to refusing to pay for longer schooling, the state defendants have made it clear to the local districts that they need not

consider a child's needs for such excess schooling. When viewed in this light, it is clear that the state defendants' policy, although neutral on its face, has the effect of prohibiting the consideration of a child's needs beyond 180 days.

In addition to the evidence discussed above, there was some testimony from representatives of the state defendants relating to the existence of a limiting policy. Employees of the State Department of Education testified that they understood the State Board's policy to be that 180 school days is all local school districts are required to provide.[11] A 180-day school year has been the tradition in this state, and all plans are made with that period of time in mind.

The court is of the opinion that the decisions of the State Board in cases involving extended school years, the position of the State Board regarding the consideration of needs for schooling in excess of 180 days by local boards, and the testimony of Department of Education officials about state board policy all evidence the existence of policy on the part of the state board which would prohibit the consideration of a child's needs for schooling in excess of 180 days. The court concludes that both the local defendants and the state defendants, contrary to their contentions, have policies which prohibit the consideration of mentally retarded children's needs for schooling in excess of 180 days and the provision of such excess schooling if necessary.

C. **Effects of Breaks in Programming**

During the trial a substantial amount of time was consumed in the presentation of evidence on the effects of breaks in programming on the educational achievement of

mentally retarded children. The plaintiffs contend that long interruptions in programming cause the mentally retarded to suffer a significant amount of "regression."[12] They maintain that regression is likely to occur during the three-month summer break and that, generally, mentally retarded children suffer greater regression and with worse effect than normal children. The defendants contend that there has not been a sufficient showing of regression to merit relief, that the evidence presented does not show that the mentally retarded children involved in this case regressed during the summer of 1979, and that a break in school programming for the summer is beneficial in many respects.

1. **Plaintiffs' Evidence**

The plaintiffs produced a considerable amount of expert testimony seeking to support their contention regarding the damaging effect of summer breaks in programming. This evidence was to the effect that mentally retarded children can suffer educational regression during interruptions in programming, with direct consequences on their progress. There was testimony that regression might involve the actual loss of skills previously acquired or a lack of motivation to perform skills that a child had retained, and included assertions that regression can cause primitive and self-destructive behavior and possibly affect many skills, including motor and communications abilities. The leading expert witness presented by the plaintiffs was Dr. Paul Alberto, an expert in the area of special education and a professor at Georgia State University. He testified that in his opinion certain external environmental influences can be detrimental to a retarded child during the acquisition phase of learning. Dr. Alberto testified that interruption of the learning process in the

structured environment of the school could cause regression. He further testified that mentally retarded children are more likely to regress than normal children because their relative inability to adjust to new environments could cause them to use acquired skills less frequently than normal children. Dr. Alberto stated that when acquired skills are used less frequently the child is more likely to lose them.

The plaintiffs' expert testimony generally supported the position that educational regression can have dire consequences for PSMR children since so many of the skills that PSMR children learn are basic living skills. These experts generally agreed that a continuous program of education would lessen the likelihood of educational regression in many such children.

While plaintiffs' expert testimony was scholarly and generally of a persuasive nature on the possibility of regression in mentally retarded children because of summer breaks in programming, it must be noted that the evidence was theoretical. Plaintiffs' witnesses conceded that there is very little empirical data on the subject of regression in mentally retarded children. In addition to the expert testimony, plaintiffs presented other evidence seeking to show regression in specific children, mainly through the testimony of their parents.

Specific Children

Russell Caine

Russell is a PSMR child approaching the age of puberty with a mental age of approximately two. In addition to being retarded, Russell suffers from certain physical handicaps. There was testimony that he showed some regression over weekends and holidays while he was at

the St. Johns Center prior to his entering the public school system. Russell's mother testified that she was not able to work as successfully with Russell as were more highly trained personnel, and that she could not get him to perform his skills with the same degree of quality that other persons could. She further testified that she observed a deterioration in his walking and feeding skills during the summer months of 1979. A physical therapist at ECC testified that she had to restrict the number of persons who could walk with Russell during the 1979-80 school year because Russell was demanding too much support from them. Dr. Bill Weaver, a licensed psychologist, performed certain evaluations on Russell in 1979 and 1980 which generally indicated that the child had made little progress since entering ECC. The plaintiffs contend that the above constitutes sufficient evidence of regression in Russell to merit a continuous educational program.

Christopher Hodgson

Christopher Hodgson is a severely retarded child attending ECC in Savannah. Christopher's mother testified that her son exhibited an increased amount of behavior problems during the summer of 1979, including feces smearing, head-banging, and destructive tantrums. Some of these problems continued when Christopher returned to school. It is the plaintiffs' contention that these problems occurred contemporaneously with Christopher's being out of a continuous school setting for the first time in six years, and that they evidence a need for a continuous education.

Keith Jenny

Keith is also a severely retarded child who attends ECC in Savannah. As did Christopher, Keith exhibited

an increased frequency of behavior problems over the summer of 1979. His problem included head-banging, picking his nose and gums until they bled, and intentional vomiting. Plaintiffs contend that Keith's maladaptive behaviors were caused by a lack of the constant training and attention he received while in school, and that they evidence a need for an extended school year.

Anthony Jackson

Anthony Jackson is also a severely retarded child attending ECC in Savannah. Anthony's father testified that over the summer of 1979 Anthony's self-feeding skills deteriorated and he showed an increased frequency of toilet accidents. The plaintiffs' contend that Anthony's decreased skill level was caused by the interruption in programming, and that he exhibits a need for an extended school year.

Based on the above evidence, the plaintiffs contend that Russell Caine and the other identified members of the class exhibit a need for schooling in excess of 180 days, and request that this court order the local defendants to provide it.

2. **Defendants' Evidence**

The defendants also produced a considerable amount of evidence on the subject of regression, including testimony by expert witnesses and by teachers and aides who actually worked with the children enrolled at ECC. The teachers' and aides' testimony was uniformly that no regression was found in Russell or any other members of the class enrolled at ECC as a result of the 1979 summer break. Some staff members of ECC testified that many of the children enrolled actually showed progress in many skilled areas at the end of the 1979 break. The testimony

of the ECC staff members was based on their observation of the children and heavily depended on an assessment study developed and carried out by the local school system. This study, known as the "portage," constituted defendants' main line of attack upon plaintiffs' claim of regression and consisted of a unique and novel application of the Portage Guide to Early Education. The portage is primarily a teaching tool and is a checklist of over 500 skills to be performed by children; it is designed to be administered to students with a developmental age of up to six years and grades children on the number of skills they can master. Primarily intended to be used in determining what skills a child has and what skills remain to be taught, it is undisputed that the portage was not designed to measure a child's developmental age.[13]

Although the portage was already being used in the Savannah-Chatham County school district in 1979 to evaluate skills, the local defendants began to use it during that year to assess the progress of PSMR students in the district. The test was administered to the 28 PSMR children in the Savannah-Chatham County school district and the results were compiled and analyzed. Members of the ECC staff who participated in the study testified that based on their findings, only one child regressed over the summer of 1979. They testified that this particular child regained his lost skills within a week and made substantial progress during the course of the year. The ECC staff members further testified that all other children tested on the portages showed varying degrees of progress over the summer of 1979. The defendants argued that the results of the portage study and evaluation, which were introduced into evidence by way of oral testimony and documents, constituted empirical evidence and refuted plaintiffs' regression claims. Defendants also

contend that the results of the portage evaluation of the PSMR children in question were due more weight than expert testimony on regression, which was basically theoretical in nature.

The court has carefully considered and weighed the evidence presented by defendants based on the specific use made of portage tests and the results obtained. The court is compelled to find, however, that the portage studies' assessments and evaluations of PSMR children are of doubtful probative value on whether or not the children regressed during the summer of 1979. The portage was designed to be a teaching tool rather than a method of assessing a child's mental ability or educational progress. Moreover, the administration, testing, and analysis of the portages were inconsistent in pattern and methodology. Nor have the portages been certified or validated for the purposes for which they were used by members of the ECC, i.e., to evaluate the children involved and compile the data testified to in the instant case.

The defendants advanced three specific theories why summer vacations are advantageous to PSMR children, this evidence being presented primarily by way of expert testimony. The first is the "battery recharge" or "burned-out" theory. Defendants contend that after nine months PSMR children, as well as their teachers, tend to become tired and bored with the structured environment of the ECC school program, and that a break is needed in order for them to be motivated. They contend that the children return to school after such a break "charged up" and more highly motivated to participate and perform. The second theory advanced by defendants was that the summer vacation allows PSMR children an opportunity to obtain a valuable informal education not available in the

structured environment of the school. It is maintained that this informal education is just as important in a child's total development as the educational program received at the school. Thirdly, the defendants theorized that the summer vacation allows PSMR children an opportunity to benefit from a generalization process, that is, affording them the opportunity to transfer skills learned at school to the home environment. Defendants contend that these skills are more valuable once a child learns to use them in everyday living.

On the subject of whether behavioral problems are caused or exacerbated by a break in summer programming, defendants state that such problems should be treated where they occur, in the home. Defendants urge that the difficulties are medical in nature and outside the scope of school system's obligations.

There is disagreement between the parties regarding mentally retarded children's needs for speech and physical therapy on an extended basis. Plaintiffs contend that many PSMR children require continuing physical and speech therapy, necessitating provision for such services beyond the 180 days provided for in the Savannah-Chatham system. Defendants dispute this and contend that any such speech and physical therapy needs can and should be carried out in a home program during the summer. They offered evidence that this had been done successfully in the Savannah-Chatham district. Defendants also argue that these needs are in any case basically medical in nature and not the primary obligation of the school system.

3. The Court's Findings

The contentions asserted and evidence presented on

the question of the effects of breaks in programming has been carefully reviewed and weighed by the court. The evidence has mainly dealt with the subject of regression and to a lesser extent the related subject of recoupment of skills.

As would be expected in a case of this nature, a barrage of expert testimony has been presented by both sides on various aspects on the question. The defendants also offered testimony on the results of portage studies of the children involved. Although the court does not find that the portage studies are without weight or value, it does discount their probative value on the issue of regression, as pointed out above. As to the conflicting testimony of parents and ECC staff personnel, while it has probative value on the issue involved, all of this testimony must be weighed and evaluated in the light of the witnesses' proximity to the problems involved in this case and the issues being litigated. One fact that is of considerable interest to the court is that all of the members of the staff of ECC who appeared testified uniformly that none of the PSMR students who were evaluated regressed during the summer of 1979. This testimony conflicts with other evidence in the case and a belief, common among educators, that as a general rule all school children have regression and recoupment problems due to the three months of the summer vacation.

With regard to the weight to be accorded the various testimony adduced at trial, it cannot be overlooked that the parents are strong advocates for twelve months of instruction for their children. As defendants pointed out, some parents may wish the school systems to take total responsibility for the care and education of PSMR children. The court has also borne in mind that teachers are

accustomed to a nine-month education period. It is also important that the teachers have been trained in the area of special education and possess more expertise in this regard than most parents. In this connection, the court was impressed with a statement by Anthony Jackson's father to the effect that a particular teacher could get Anthony to respond in ways that the parents could not.

The court does not accept the defendants' contention that behavioral problems and speech and therapy needs are not the obligation of the educational system. Treatment of these types of problems in many cases may be a part of a child's special education program, or may be necessary in order for a particular child to benefit from its education. The Handicapped Act's definition of related services indicate that the treatment of such problems was contemplated for handicapped children, including the mentally retarded. Further, some of the services already provided by the state school system encompass this type of need.

The evidence presented on the degree of regression suffered over the summer by the individual child plaintiffs was inconclusive. While the court rejects altogether defendants' asertion that no regression took place, it remains unconvinced that the mandatory injunction sought by the named children, which would order them to be given summer schooling, should issue. The bulk of evidence showing a likelihood of regression applied to retarded children in general and was not tied to the individual child plaintiffs. That which did address the children's individual regression came primarily from their parents, who are also parties to this action. Overall, the evidence presented was not conclusive enough to justify the issuance of the mandatory injunction. This is not to say that

the individual child plaintiffs cannot show at the administrative level that a longer school year is dictated, but merely that they have not done so in this case because the evidence presented was more generally applicable to the class as a whole. The requested injunction must be denied.

The court has found that defendants have policies prohibiting the consideration or provision of school years longer than 180 days, which means that these children have never had their individual needs for longer school years evaluated. As discussed below, see pages [34c-37c] *infra*, the court is of the opinion that these individualized determinations should be made in the first instance by the defendants. If the children's needs are considered without the inhibiting limitation of the 180-day policy, it is entirely possible that they will be found to require more than 180 days of school.

III. Conclusions of Law

A. The 180-Day Policy and the Handicapped Act

The Education for All Handicapped Children Act ("Handicapped Act"), 20 U.S.C. §§1401 *et seq.* (1976), provides financial assistance to states in furnishing educational services to handicapped children. The receipt of federal monies, however, is not without its price. The Handicapped Act imposes certain duties and obligations upon states which must be performed in order to continue the flow of funds. Generally, the Handicapped Act requires all states receiving funds thereunder to effect "a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. §1412(1). 20 U.S.C. §1401(18) defines "free appropriate public education" as:

> Special education and related services which (A) have

> been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the state educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the state involved, and (D) are provided in conformity with the individualized education program required under §1414(a)(5) of this title.

The Handicapped Act defines "special education" as a program of instruction which is specially designed "to meet the *unique* needs of a handicapped child," free of charge to the parents or guardians of such child. 20 U.S.C. §1401(16) (emphasis added). "Related services" are those supportive services which may be necessary for a certain handicapped child to benefit from the special education he is to be provided with. *Id.* §1401(17).

An appropriate education for each child is generally determined by that student's "Individualized Education Program" (IEP). An IEP is a written statement for each handicapped child which is developed at a meeting between the child's parents, teacher, and a qualified representative of the school board or agency that is to provide services for that child. The IEP is required to contain a statement of the child's present level of performance, a statement of goals and objectives for that child, a statement of specific services to be provided to the child, the projected date for the commencement of such services, and the anticipated duration of the services. The IEP should also contain some neutral criteria for determining whether the child's objectives are being achieved, and should be reviewed and revised where appropriate on a periodic basis. *Id.* §§1401(19) & 1414(a)(5). The IEP is the key to determining what services a child needs, and with what services he will be provided.

In addition to the substantive provisions set forth above, the Handicapped Act provides certain procedural safeguards to insure the provision of a free appropriate education for each child. The parents have the right to examine all relevant records pertaining to the placement of their child in order to obtain an independent evaluation of the child's educational needs. Parents are entitled to written, prior notice of any proposed or refused change in their child's program, and have the right to complain about any matter relating to the provision of a "free appropriate public education" to their child. If a complaint is filed as provided in the Handicapped Act, the parents or guardian have the right to an impartial due process hearing before a person employed by the agency or unit which is to provide education or care for the child. *Id.* §1415(b).

If the hearing is conducted by a local district, an aggrieved party has the right to appeal any final decision to the state educational agency, which is required to conduct an impartial review of the local hearing. *Id.* §1415(c). Any person aggrieved by a final decision of the state educational agency has the right to bring a civil action in state or federal court with respect to any complaint that has been filed. *Id.* §1415(e).

From the above discussion it is clear that the Handicapped Act places an emphasis on the individual needs of a particular handicapped child. "Special education" is defined in terms of what is necessary to meet a handicapped child's unique needs. The provision of "related services" is also individual-oriented since a supportive service necessary for one child might not be required for another. Further, "related services" by definition includes "the early identification and assessment of handicapping

conditions in children." *Id.* §1401(17). This is also an individual-oriented function, particularly in light of the broad range of handicaps covered by the Handicapped Act. *Id.* §1401(1). Also, the procedural safeguards make sure that the individual needs of each child are fully considered and provided for.

The Handicapped Act's emphasis on the individual child is most clearly shown by the requirement of an IEP. The conference preceding the IEP is designed to consider a child's specific needs, including the development of reasonable goals and objectives for the child. The IEP is to be based upon those considerations. There can be no doubt that the function of the IEP is to develop a plan of education appropriate to the particular needs of each handicapped child. This court concludes that the Handicapped Act requires that full consideration be given to the individual educational needs of each child in the development of a program for that child. To the extent that a state has a policy which prohibits, or even inhibits, such full consideration, the court is of the opinion that such policy constitutes a violation of the Handicapped Act.

The Handicapped Act places the ultimate responsibility for compliance on the state educational agency. 20 U.S.C. §1412(6) provides:

> The state educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency.

Section 1414(d) of the Handicapped Act states that whenever a state educational agency determines that a local education agency is, for various reasons, not providing programs of free appropriate education, "the state educational agency shall use the payments which would have been available to such local educational agency" to provide an appropriate education directly to the handicapped children in the area served by the local agency.

The court concludes that the above-discussed provisions of the Handicapped Act clearly places the responsibility on the state educational agency to make sure that local agencies provide adequate educational services to handicapped children, or to provide directly such services themselves.

The court must now determine whether the defendants' policies violate the provisions of the Handicapped Act. In light of the Handicapped Act's clear emphasis on the individualized needs of each child, as discussed *supra*, the court concludes that an across-the-board policy prohibiting the consideration of a child's needs beyond 180 days violates the Handicapped Act, as does a policy limiting the provision of schooling to 180 days. A policy limiting schooling regardless of individual needs contravenes the defendants' obligation to make a case by case determination. Such a policy assumes that no child needs more than 180 days, without any individual consideration.

The defendants argue that the language of the Handicapped Act, the regulations promulgated thereunder, and the legislative history indicate a congressional intent that handicapped children only be provided the 180 days of schooling traditionally provided to normal children. This court disagrees. It is well settled that the starting point in the construction of any statute is its language. *See*,

e.g. Southeastern Community College v. Davis, 442 U.S. 397 (1979). As discussed above, the language of the Handicapped Act clearly indicates that an emphasis should be placed on the individual needs of each child in developing an educational program for that child. A policy which prohibits such individual consideration clearly violates the provisions and intent of the Handicapped Act. The clarity of the statutory language obviates any need to consider the agency interpretation or legislative history. *See, e.g., Consumer Product Safety Commision v. GTE Sylvania, Inc.*, 447 U.S. 102, 100 S.Ct. 2051 (1980); *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); *Glenn v. United States*, 571 F.2d 270 (5th Cir. 1978).

The court concludes that the Handicapped Act places responsibility on defendants to fully consider the individual needs of all handicapped children. As the 180-day policy prohibits or at best limits individual consideration of the needs of each child it must be discontinued. In the case of the state defendants, the manifestations of the policy include a refusal to require local school districts to consider or provide for schooling in excess of 180 days, a refusal to pay for schooling in excess of 180 days, and a failure to fully consider the needs for excess programming in cases that have been appealed to it.

There can be no question that the defendants must provide schooling in excess of 180 days for any child that may need it. The Handicapped Act's mandate in this regard is clear. The state and local defendants have a joint obligation to provide each handicapped child with an appropriate education, with the ultimate responsibility for such provision falling on the state. If a particular child is determined to need schooling in excess of 180 days in order to have a "free appropriate public education," the

defendants are obligated to provide it.

The conclusion in this case is supported by the holding of the Third Circuit Court of Appeals in *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3rd Cir. 1980). In *Battle*, the court was faced with the question of whether or not an administrative policy of Pennsylvania which set a limit of 180 days of instruction per year for all children violated the Handicapped Act.[11] After reviewing the relevant facts and the provisions of the statute, the Third Circuit concluded Pennsylvania's policy to be "incompatible with the Act's emphasis on the individual." 629 F.2d at 280. The court further held that "the 180 day rule imposes with rigid certainty a program restriction which may be wholly inappropriate to the child's educational objectives." *Id.*

Unlike the defendants in *Battle*, the instant defendants contend that they have no policy prohibiting the consideration of a child's needs for schooling in excess of 180 days. However, after consideration of all the facts, the court has conclusively found that such a policy does exist on the part of both local and state defendants. The issue in this case regarding the policy therefore becomes the same as was faced in *Battle*, and the same result in reached.

Further support is drawn from *North v. District of Columbia Board of Education*, 471 F.Supp. 136 (D.D.C. 1979). In *North*, the Court had to decide whether a severely handicapped sixteen year old epileptic needed to be placed in a residential facility and, if so, whether the District of Columbia Board of Education was responsible for providing for that placement. The defendants contended that the child's needs were medical in nature, and that his educational needs could be adequately attended to without residential placement. The court decided that

the child's emotional and educational needs were closely interwoven, and that residential placement by the Board of Education was required. The Court entered a preliminary injunction to that effect. Although there are some obvious factual distinctions,[14] this court is of the opinion that the decision in *North* is supportive of the conclusion reached in the case at bar. The district court found that the Handicapped Act placed an obligation on the defendant school board to provide for a child's needs even though they differed from those of a normal child. Similarly, this court finds that the Handicapped Act places an obligation on defendants to consider and provide for the needs of handicapped children under its jurisdiction, even if such needs differ from those of normal children.

B. **The 180-Day Policy and Section 504**

The defendants argue that Section 504 of the Rehabilitation Act of 1973 ("Section 504") is inapplicable in the instant case. They contend that Section 504 does not place a duty on recipients of federal funds to act affirmatively and cite *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) as authority. Further, it is their position that the Handicapped Act, as a more recent and specific statute, supersedes Section 504 on the question of education for handicapped children, and that the two acts should not be simultaneously applied in this case. The defendants also contend that Section 504 does not provide a private right of action for programs other than those pertaining to employment, and that since it prohibits discrimination, they are not in violation of Section 504 because the plaintiffs in this case are not being excluded from educational programs. They argue that the plaintiffs are seeking benefits that are not received by normal students, and that the intent of the Act was

simply to prevent plaintiffs and children like them from being entirely excluded from the system. Since there is no exclusion or discrimination, defendants urge that Section 504 does not apply.

After careful consideration of this matter, the court concludes that Section 504 is applicable to the plaintiffs' claim, and that the defendants' refusal to consider the educational needs of handicapped children beyond 180 days violates Section 504. Section 504, 29 U.S.C. §794, reads as follows:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(7) of this title, shall, solely by reason of his handicap be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulations shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take affect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

It is clear that Section 504 prohibits a handicapped individual from being denied the benefits of an educational program which receives federal financial assistance. This language shows that the congressional intent was not merely to prohibit the denial of access to such programs, but also to give handicapped persons an opportunity to enjoy the benefits of, and have access to, such programs. It indicates that special treatment or addi-

tional services may be necessary for the handicapped person to fully enjoy the benefits of his education. Mere access to conventional education may not be sufficient. If Congress had intended only to prohibit the denial of access to federally funded educational programs, it could easily have done so.

The United States Supreme Court has recognized that equal access may not always be enough to provide equal opportunity. In *Lau v. Nichols*, 414 U.S. 563 (1974), a case brought under Title VI of the Civil Rights Act of 1964, the court upheld the right of Chinese children to have bilingual instruction. The court held that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." 414 U.S. at 566. The court stated that it was "obvious that the Chinese-speaking minority received fewer benefits than the English-speaking majority from respondents' school system . . ." 414 U.S. at 568. The court held that such receipt of different benefits constituted discrimination, and required that some relief be fashioned so that Chinese-speaking children could benefit from the school system.

Although brought under a different statute, the same reasoning is applicable in this case. Just as some special treatment was necessary for the Chinese-speaking students in *Lau* to enjoy the benefits of their education, some special treatment may be necessary for handicapped children to benefit from theirs. If a child needed a special service to gain equal benefit from his education, the denial of that service would constitute discrimination in violation of Section 504. Individual attention to the needs of

each handicapped child is the only way to determine whether such special or additional services are needed.

Regulations promulgated pursuant to Section 504 support the above interpretation. 34 C.F.R. §104.33 requires recipients of federal funds that operate public elementary or secondary school programs to "provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap." 34 C.F.R. §105.33(a). Appropriate education is defined as regular or special education designed "to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met . . ." 34 C.F.R. §104.33(b)(1). Pursuant to 34 C.F.R. §104.33(b)(2), implementation of an IEP developed in accordance with the Act is one way of providing education that meets the individual needs of handicapped children. The regulations discussed above readily indicate the necessity for individualized attention to the needs of handicapped children. There can be no doubt that they, as does the Handicapped Act, place an emphasis on the individual.

A similar conclusion was reached in *Doe v. Marshall*, 459 F.Supp. 1190 (S.D.Tex. 1978). There the court held that Section 504 "places upon school districts . . . the duty of analyzing individually the needs of each handicapped student and devising a program which will enable each individual handicapped student to receive an appropriate, free public education." 459 F.Supp. at 1191. The court therefore entered an order enjoining the defendant school district from preventing the handicapped plaintiff from playing football during the school year in question. This court agrees with the court in *Doe* that Section 504 places a duty on school districts to individually consider

the needs of each handicapped student within its jurisdiction.

The defendants' contention that Section 504 only provides a private right of action in cases involving employment is clearly not the law in this circuit. In *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980), *cert. granted* 101 S.Ct. 352 (1981), the court allowed a deaf graduate student to bring a private right of action under Section 504 to challenge the denial of interpreter services by the University. After *Camenisch*, it is clear that in this circuit, a private right of action under Section 504 is proper in cases other than employment cases.

The defendants' position that the Act supersedes Section 504 and that they should not be jointly applied is similarly without merit. In *Tatro v. State of Texas*, 625 F.2d 557 (5th Cir. 1980), the court held that the failure to provide catheterization services for a handicapped child violated both the Handicapped Act and Section 504. Also, in *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981), the court held, *inter alia*, that the expulsion of handicapped students from school without consideration of whether or not the students' misconduct was related to their handicapped condition violated both the Handicapped Act and Section 504. In both *S-1* and *Tatro*, the Fifth Circuit applied the Handicapped Act and Section 504 together.

The defendants' reliance on *Southeastern Community College v. Davis*, *supra*, is misplaced. As the Fifth Circuit stated in *Camenisch*, *supra*, "the Supreme Court's decision in *Southeastern Comunity College* says only that Section 504 does not require a school to provide services to a handicapped individual for a program for which the individual's handicap precludes him from ever realizing

the principal benefits of the training." 616 F.2d at 133. The case sub judice is clearly distinguishable from *Southeastern Community College* because the instant plaintiffs will realize the principal benefits of their training.

Southeastern Community College is also distinguishable in that it involved a post-secondary educational institution and required the interpretation of a differenct set of implementing regulations than those at bar. In *Southeastern Community College*, the Supreme Court interpreted Subpart E of the regulations entitled "Post Secondary Education." The regulations involved in this case are contained in Subpart D which is entitled "Pre-school, Elementary and Secondary Education." Requirements and definitions applicable under one part may not be applicable under another.

The court concludes that Section 504, in conjunction with its implementing regulations, requires a recognition of the individual needs of all handicapped children by educational programs or systems which receive federal funds. Because the defendants' 180-day policy prohibits the individual consideration of children's needs, it violates Section 504.

C. **Provision of Extended Programs to Specific Children**

Plaintiffs also seek an order requiring the defendants to provide extended school year programs for Russell Caine and other identified members of the class. In view of the court's finding regarding the effects of breaks in programming, the mandatory relief requested cannot be granted. While there is evidence in this case which indicates that there may generally be a need for extended school programs for PSMR children, it does not clearly show that any particular PSMR child identified in this

case is in need of an extended year. Absent a showing or immediate irreparable harm, injunctive relief—particularly mandatory injunctive relief—is inappropriate. *See* 11 *Wright and Miller, Federal Practice and Procedure* §2942 at 377.

As the court has noted above, the defendants have never considered the needs of Russell Caine or the other individual children for schooling longer than 180 days. The evidence clearly showed that at the time the IEPs were developed for these children, the agents or employees of the defendants who participated in their formulation deemed that the school year had to be limited to 180 days. In fact, the defendants' policies had effectively placed such a limit on the school year. Although the State Board of Education, in its decision on Russell Caine's appeal from the decision of the local board, found that Russell did not have a need for 180 days, the decision of the lower board was clearly grounded on the fact that the state would only fund schooling for 180 days. The local hearing officer actually found that there was some evidence of a need for extended schooling for Russell Caine but felt that the local board was only obligated to provide 180 days.[16] In light of the above, it appears clear that the needs of Russell Caine or any of the other children for schooling in excess of 180 days were not considered.

The court is of the opinion that the individual determination of need should be made in the first instance by the state and local defendants. As the court noted in *Battle v. Commonwealth of Pennsylvania, supra*, the Handicapped Act contemplates this. This is most clearly evidenced by its requirement that the state develop plans for providing free appropriate public education, and its

provision that personnel of local and state educational agencies are primarily responsible for the formulation of a child's IEP. The tradition of local control of educational policy and decisions is long-standing. *See Milliken v. Bradley*, 418 U.S. 717, (1974); *San Antonio School District v. Rodriguez*, 411 U.S. 1, (1973); Note, *Enforcing the Right to a "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 Harv.L.Rev. 1103 (1979). Also, it should be noted that the difficulty of such decisions demands that they be made in the first instance by local officials with more specialized knowledge and expertise in the area. *See Battle v. Commonwealth of Pennsylvania, supra.*

In sum, the court concludes that the determination of whether any mentally retarded child needs more than 180 days of schooling is a burden that the defendants (not the plaintiffs) must carry in the first instance, i.e., in the IEP process. *See S-1 v. Turlington*, 635 F.2d at 349.[17]

Therefore, the court declines to require the defendants to provide the named plaintiff or any other member of the class specific extended school programs. However, the court will order the defendants to consider the named plaintiff and all other handicapped children's needs without limitations. Although the court has concluded that the child plaintiffs' individual needs for a longer school year have not truly been considered, it would be manifestly inappropriate for the court to attempt to make such specialized educational determinations without first permitting the state and local defendants to reconsider their findings in light of this order.

In reaching the above decision, the court is mindful of the possibility that the inevitable is merely being postponed. The Handicapped Act provides federal and state

judicial review of individual educational programs when appeals are initiated, which might very well require this court to evaluate the substantive contents of educational programs of individual children after the educational officials have acted.[18]

D. **Violation of State Law and the United States Constitution**

The plaintiffs have alleged that the policies of the defendants violate various provisions of the United States Constitution and state law. For the reasons discussed below, the court will not decide those claims.

Plaintiffs seek to invoke this court's pendent jurisdiction to review its claim under the Adequate Program for Education in Georgia Act, *Ga. Code Ann.* §32-601a *et seq.*, and other relevant state law. It is well established that the exercise of pendent jurisdiction lies in the discretion of the court. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); *Gregory v. Mitchell*, 634 F.2d 199 (5th Cir. 1981). As this case involves novel interpretations of state law and state constitutional provisions, the court is of the opinion that those interpretations should be made by state courts in the first instance. *See, e.g., United Services Life Ins. Co. v. Delaney*, 328 F.2d 483 (5th Cir. 1964), *cert. denied* 377 U.S. 935. The court therefore declines to exercise pendent jurisdiction over the state claims.

With regard to the federal constitutional claims, the plaintiffs contend that the defendants' policies violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and that these violations are actionable under 42 U.S.C. §1983. In light of the disposition of this case under the applicable federal statutes this

court needs not address the constitutional claims, and indeed judicial restraint requires that they be left alone. The relief granted to plaintiffs in this case, requiring the defendants to give individual consideration to the needs of each handicapped child, is as complete as it could be under the circumstances. No order could properly issue extending the school year for any of the children absent a showing of a need for such extension.

E. **Motion for Recertification of Class**

The defendants have filed a motion for redefinition or recertification of the class. Specifically, the defendants request that: (a) the class be limited to profoundly or severely mentally retarded children as opposed to all mentally retarded children as set forth in the order of June 11, 1979; (b) that the class be limited to the PSMR children in Chatham County rather than being statewide in scope as is now the case; and (c) if the court allows the class to remain statewide in scope, that the local defendants be dismissed as unnecessary parties or that the remaining 186 school systems be added as indispensable parties.

After careful consideration of the matter, the court concludes that redefinition of the class is not warranted. In July of 1979 Judge Murphy defined the class as including "all handicapped children of school age in the state of Georgia who are mentally retarded, and who, because of their special needs, require more than 180 days of public school programming . . ." and their parents. That definition describes all persons who are entitled to and have received relief pursuant to this order. This order, in effect, requires the state defendants to ensure that the needs of all mentally retarded children are considered

without the limitations of the 180-day policy. If a child needs programming in excess of 180 days, this order requires the state defendants to see to it that such additional programming is provided. Consideration of and provision for a mentally retarded child's individual needs is mandated by the Handicapped Act, regardless of whether the child is mentally retarded or PSMR. While it might be true that PSMR children are more likely to need extended programs, other mentally retarded children have the same right to have their needs considered; if they need extended programs, they have a right to have them provided. Since the defendants' policies violate the rights of all mentally retarded children, and since the relief granted in this order, an injunction against the continuation of that policy, will inure to the benefit of all mentally retarded children, the court concludes that the class need not be limited to PSMR children but that it can include all mentally retarded children.

The court also disagrees with the defendants' contention that the class should be limited to children in Chatham County. The state defendants' policy of refusing to consider or provide for the needs of a child for schooling in excess of 180 days violates the rights of all mentally retarded children in the state of Georgia under the Handicapped Act. That being the case, the state defendants must be required to discontinue the policy for all children in the state rather than just those in Chatham County. It would not be logical to allow the state to continue an illegal policy elsewhere in the state. Accordingly, the court concludes that the class should include all mentally retarded children in the state of Georgia.

The court disagrees with the contention of the local defendants that they should be dismissed as parties to this action because their participation is unnecessary to

afford complete relief to plaintiffs. Although their discontinuation of the policy will not have statewide effect, it is proper to require them to discontinue the policy as to that portion of the class that resides in Savannah-Chatham County. Since the local defendants have no responsibility for providing services to members of the class other than those in their school district, they will not be prejudiced by being required to remain in the lawsuit. Fed.R.Civ.P. 20(a) governs when parties may be joined as defendants in one action and provides in part that persons may be joined as defendants in a single action

> if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded.

It is clear that the local defendants are proper parties to this action under Fed.R.Civ.P. 20(a) and need not be dismissed.

The court also disagrees with the defendants' contention that the remaining 186 local educational agencies are indispensable parties. Under Fed.R.Civ.P. 19, a party must be joined if

> . . . (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or other-

wise inconsistent obligations by reason of his claimed interest.

Fed.R.Civ.P. 19(a). The court is of the opinion that complete relief can be accorded among the defendants who are already parties to this action. In requiring the state defendants to make sure that the needs of all children for education beyond 180 days are considered, the court is affording complete relief. The state defendants have a responsibility under the Handicapped Act to make sure that such needs are considered and provided for and must do so even if the local educational agency has no programs for mentally retarded children. By requiring the state defendants to carry out their obligation under the Handicapped Act, complete relief will be afforded to the plaintiff class. Since no order is being entered against the remaining 186 local school districts, their ability to protect their interest in this matter will not be impeded or impaired. The state defendants can make sure that all children's needs are considered by requiring the local agencies to consider such need or by considering such need themselves. The only effect that this order will have on local agencies is indirect, and the court concludes that the remaining 186 local educational agencies are not indispensable parties and need not be joined. *See Arias v. Wainwright*, 28 F.R.Serv.2d 483 (N.D.Fla. 1979).

F. **Motion to Dismiss Individual Defendants**

The local and state superintendents and members of the boards of education were sued in their official and individual capacities. The individual local defendants have filed motions to be dismissed from this cause. Having found no abuse of discretion and no acts in excess of their authority, the court concludes that the individual defendants should be dismissed from this action in their

individual capacities. *See Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Fowler v. Cross*, 635 F.2d 476 (5th Cir. 1981). However, the court finds it appropriate that the individual defendants remain in the action in their official capacities.

Further, it will be ordered that all of the individual defendants who no longer hold the public office that they held at the time this action was instituted be dismissed from this case, and that their successors in office be substituted therefor. Fed.R.Civ.P. 25(d)(1).

All motions not specifically addressed or ruled on above will be denied as moot.

IV. Relief Granted

A. Declaratory Relief

It is the judgment of this court that the policies of the defendants that prohibit the consideration and provision of schooling for mentally retarded children in excess of 180 days violate both the Education for All Handicapped Children Act ("Handicapped Act"), 20 U.S.C. §1401 *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. These policies prevent handicapped children from receiving the individualized attention to their needs that is mandated by both statutes. It is violative of these statutes to fail to consider whether a particular child needs schooling in excess of 180 days, and to fail to provide such excess schooling if needed.

It is further the opinion of the court that the defendants have an obligation to provide speech therapy, physical therapy, psychological services, and whatever other supportive services are necessary for children to benefit from their educational programs. Such services clearly fall within the definition of related services under the

Handicapped Act, and must be made available as part of the state's obligation to provide a free appropriate public education. The provision of such services is limited by statute, however, to those necessary to "assist a handicapped child to benefit from special education . . . ." 20 U.S.C. §1401(17).

It has not been determined by this court that the mentally retarded children here involved are entitled to a declaratory judgment that the defendants are obligated to provide educational programs in excess of 180 days to specific children since there has not been a conclusive showing of need for extended programs.

In making the rulings outlined in this opinion, the court is mindful that lurking in the background are many other thorny problems that have not been dealt with, such as financial limitations and the possibility of overburdening available school personnel. These and other issues must eventually be addressed by a court or some other appropriate body in the future.

B. **Injunctive Relief**

1. **The Continued Application of the Policy**

In view of the above determination, the court concludes that the plaintiffs are entitled to the entry of an injunction against the continued application of the 180-day policy by defendants. The entry of injunctive relief is appropriate in the absence of an adequate legal remedy for plaintiffs' claim. *See Lewis v. S.S. Baune*, 534 F.2d 1115 (5th Cir. 1976); 11 *Wright and Miller, Federal Practice and Procedure* §2944 (1973). Irreparable injury is one means of showing an inadequate remedy at law. In the instant case, it is clear that a continued application of defendants' policy prohibiting the consideration of or provision for a child's educational needs would work an

irreparable harm on the plaintiff class. As long as that policy is in effect, the mentally retarded children in the plaintiff class will not receive the full individualized consideration to which they are entitled, and thus might not receive a "free appropriate public education." Neither money damages nor any other legal remedy would compensate for this loss.

The harm that would befall the children in the plaintiff class from a continued application of the policy outweighs any possible harm to the defendants from discontinuing the policy. Also, the public interest is more likely to be served by a discontinuation of the policy than by its continuation. Therefore, the court has concluded that the defendants should be enjoined from refusing to consider the needs of handicapped children for educational programming in excess of 180 days, and from refusing to provide such excess schooling if needed.

2. **Mandatory Injunction for Specific Children**

As discussed above, there has been no definitive showing of a need for an extended school year for any particular children. Since there has been insufficient persuasive proof of need, the threat of irreparable harm has not been sufficiently shown to merit injunctive relief. Accordingly, the court refuses to require extended programs at this time for any particular children and will allow the state and local defendants to make their evaluations.

An appropriate order will be issued in accordance with the foregoing opinion.

This the 2nd day of April, 1981.

/s/ HORACE T. WARD
HORACE T. WARD
UNITED STATES DISTRICT JUDGE

FOOTNOTES

[1] *See, e.g., PARC v. Commonwealth of Pennsylvania*, 334 F.Supp. 1257 (E.D.Pa. 1971), 343 F.Supp. 279 (E.D.Pa. 1972), and *Mills v. Board of Education of District of Columbia*, 348 F.Supp. 866 (D.D.C. 1972).

[2] See pp. [22c-23c] *infra*.

[3] This does not include various voluntary programs and special programs that are designed to assist certain mildly retarded children. At issue in the instant case are only programs which are systematically and routinely provided by school districts.

[4] The written decision of the local hearing officer contained the following statement: "Evidence presented indicated that there is no need for a continuous program to optimally meet Russell Caine's needs, however, state law does not provide a funding pattern that will allow local educational agencies to operate beyond the 180 day school year." Plaintiffs' Exhibit 1, hearing of April 18, 1978, page 5.

[5] See Plaintiff's Exhibits 37, 90, 91, 92, 93, and 94.

[6] In a deposition taken on April 30, 1979 in connection with this proceeding, Eldon Basham, then legal assistant for the State Department of Education, testified as follows in response to questions from plaintiffs' counsel:

Q. Did you deal with the problem of what would occur if they found a program inadequate but did not suggest an alternative program?

A. In terms of saying that the school would have to come up with an appropriate program.

Q. Did you talk to them about the scope of things they could consider as to the issues of adequacy or not?

A. No.

Q. Have you ever spoken or trained or presented any correspondence to any hearing officer concerning whether or not they could consider more than 180 days during the scope of the due process hearing?

A. Not whether they can consider it, but whether they have the authority to order it. We said that we do not know whether the law requires more than 180 days, and have said that we do not think it is within their authority to order a school system to provide more than 180 days, but not that they can't consider it; just that we did not think—

Q. It was within their authority?

A. [Nods head affirmatively.]

Plaintiffs' Exhibit 24, page 13-14.

[7] *In re JEBG*, Case No. 1979-5, is illustrative. This case involved an appeal by a local school system from an order of a local hearing officer requiring the school system to provide a student with an 11-month program. Although the state hearing officer recommended that the decision of the local hearing officer be upheld, the State Board of Education refused to accept this recommendation on the ground that a local board is only responsible for the educational cost of a 180-day program. This case and the other cases discussed in the text indicate the state defendants' policy regarding the provision of schooling in excess of 180 days.

[8] *See* 20 U.S.C. §§1412(6), 1414(d); pp. [25c] *infra*.

[9] Dr. Allen W. Gurley, the director of the Division of Early Childhood Special Education, Title I of the State Department of Education, gave three separate depositions in connection with this proceeding which were all admitted into evidence as plaintiffs' exhibits. In a deposition taken in April of 1979, Dr. Gurley testified as follows in response to questions from plaintiffs' counsel:

Q. Do you correspond with hearing officers for the school districts for the purposes of mediation?

A. I have discussed mediation by phone with superintendents and administrative staffs.

Q. And during the discussions, has it included discussions of the word "appropriate" for the purposes of their providing educational services?

A. I don't recall.

Q. Has it included discussions of the word "adequate"?

A. I don't recall.

Q. Have you had any discussions concerning whether a school district needed to provide more than 180 days of school?

A. Yes.

Q. When did you have those discussions?

A. I don't recall.

Q. Have you had several discussions or a few discussions?

A. Very few.

Q. Have you been asked a question whether they have been required to so provide?

A. Right.

Q. And what has been your response?

A. No.

Q. Is that the policy of the state, that there is no policy requirement to provide?

A. Yes.

Q. And what is the basis or the legal authority, as you understand it, for that policy?

A. The State Board of Education.

Q. Has the State Board of Education passed on that official policy?

A. They have taken deposition in the hearing.

Q. And what hearing was that?

A. It's a hearing involving a child in Savannah.

Q. The hearing that was the hearing before this particular case?

A. Right.

Q. And it is your understanding that their position is a school district need not provide more than 180 days of services, even if the child's special needs would so require those services?

A. That is correct.

Later in the same deposition, Dr. Gurley testified as follows:

Q. Have you ever been asked as to whether they need to make that consideration?

A. It's been a practice that our services would be provided for 180 days, and if I had been asked, that's what I would say.

Q. So if a child is evaluated, he is evaluated for 180 days of school?

A. That is right.

Q. And an IEP is written for only 180 days in mind?

A. [Nods head affirmatively.]

Q. And there is no separate consideration as to whether that child would need 200 days or 300 days of school?

A. There may be by an LEA (local educational agency), but it would be at the LEA's own prerogative.

Q. And they would not receive any additional pass-through funds or additional state funds?

A. That's true.

Plaintiffs' Exhibit 23, pages 81-84.

[19] Dr. Herbert D. Nash, then the director of the Special Education Program of the State Department of Education, gave a deposition in April of 1978 in connection with the administrative proceeding in this case. In that deposition, admitted into evidence as Plaintiffs' Exhibit 18, Dr. Nash testified as follows in response to questions from plaintiffs' counsel:

Q. Is it not possible, sir, that a free and appropriate public education designed for a child's unique needs could include a program that is more than 180 days?

A. If the local education agency assumes the responsibility for

costs and for providing such a program though it extend beyond 180 days the answer would be yes.

Q. And that is under your understanding of the federal definition and requirements?

A. Yes.

Plaintiffs' Exhibit 18, page 25. In the same deposition, Dr. Nash testified that Georgia's "state plan" does not require local agencies to provide more than 180 days of school for mentally retarded children. Plaintiffs' Exhibit 18, page 11.

In a deposition also taken in April, 1978, Dr. Gurley testified further on this particular point:

Q. Now, if a local school district either voluntarily or under the requirement of a court order was forced to furnish more than or was required to furnish more than the 180 days of school, would they receive any state funds to your knowledge from the Department of Education under A.P.E.G. or any other program that you know of to help defray the costs of the additional school days?

A. I know of no funding source at this time . . .

Plaintiffs' Exhibit 17, page 16.

In a deposition taken as late as March of 1980, Dr. Gurley testified as follows:

Q. Does the state have a policy of whether they will fund or require the funding of private school placement for more than 180 school days or 270 calendar days?

A. Our assistance to the local school districts in what is known as a tuition grant is only for the regular school year, the nine months, the 180 school days or the 270 calendar days which are synonomous as far as time concerned.

Q. If a child's IEP which includes a private school placement requires that the placement be for a full or more than 180 school days or 270 calendar days, is there any policy, practice of the state board as to whether that should be funded by the local educational agency?

A. Local educational agencies have been advised that they are not prohibited from doing this.

Q. Have they been advised whether they are required to pay for it?

A. They are required to pay for what they agreed to in the IEP.

Plaintiffs' Exhibit 50, page 19.

[11] See Gurley Deposition of April, 1978 at pages 15 and 34; Nash Deposition at pages 8 and 13; and Gurley Deposition of April, 1979 at page 82.

[13] The evidence showed that there was no common definition of the term regression. In addition to varying definitions, the evidence also showed that there is no common agreement as to what variables (forgetting, motivation, etc.) are masked by the term. The term will be used in this order to refer to a drop in a child's level of performance.

[14] The application and results of the portage study described below apparently were developed in consultation with Dr. Keith Turner, an educational expert retained by the defendants during the course of the preparation for the trial of this case. Dr. Turner, a well-recognized authority in this area, was offered as the principal expert defense witness at the trial. Dr. Turner has testified in other major cases, including the district court trial in *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3rd Cir. 1980).

[15] For an exhaustive discussion of the facts in *Battle*, see the well-written opinion of Judge Newcomer in *Armstrong v. Kline*, 476 F. Supp. 583 (E.D.Penn. 1979).

[16] *North* involved one student rather than a class action, and was concerned with a residential placement instead of the 180-day question.

[17] See Note 3, *supra*.

[18] In *S-1 v. Turlington*, *supra*, the court was faced with the question, *inter alia*, of whether the Handicapped Act and Section 504 placed the burden of raising the question of whether a student's misconduct was a manifestation of the student's handicap on the state or on the student. The court made the following conclusion: "In light of the remedial purposes of these statutes, we find that the burden is on the local and state defendants to make this determination." 635 F.2d at 349.

[19] In *Battle*, the Third Circuit, after making a similar conclusion, commented as follows:

> We recognize that by this decision we may merely be postponing the inevitable. The statute provides for federal and state judicial review of individual educational programs which have been appealed through the statutory procedure. *Id.* §1415(e)(2). Thus it is quite possible that, in the future, we will be called upon to evaluate the substantive content of educational programs developed under the Act. We are hopeful, however, that prior to that day the states, in cooperation with the Commissioner of Education will establish acceptable guidelines to aid in that most difficult decision.

629 F.2d at 281. This court shares that hope.

ORDER OF COURT

In accordance with the Memorandum Opinion filed in the above-captioned case, it is hereby ORDERED and ADJUDGED as follows:

1. Plaintiffs' request for declaratory relief is GRANTED as set forth in Part IV-A of the Memorandum Opinion. In summary, it is hereby declared as a matter of law that the local and state defendants' policies and practices of refusing to consider and provide for the educational needs of mentally retarded children for schooling in excess of 180 days per year violate both the Education for All Handicapped Children Act, 20 U.S.C. §1401 *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

2. Plaintiffs' request for injunctive relief is GRANTED in part and DENIED in part as hereinafter set forth.

a.) The defendants, their agents and employees are hereby permanently RESTRAINED and ENJOINED from continuing policies and practices of refusing to consider and provide for the educational needs of mentally retarded children for schooling in excess of 180 days per year.

b.) Plaintiffs' request for a mandatory injunction requiring the state and local defendants to provide more than 180 days of schooling per year to particular children is DENIED.

c.) The local defendants are DIRECTED to consider and evaluate, in accordance with the terms of this Order and the Memorandum Opinion, the needs of members of the class of child plaintiffs who are enrolled in the Savannah-Chatham School District. The members of the class of child plaintiffs enrolled in that district's schools

who have already had their Individualized Education Programs developed for the 1981-1982 school year are entitled to reconsiderations which disregard the 180-day policy which previously has been enforced.

3. The motion of the individual local defendants to be dismissed from this action in their individual capacities is GRANTED.

4. The defendants' motions for redefinition of the classes are DENIED.

5. It is ORDERED that all of the individual defendants who no longer hold the public offices they held at the time this action was instituted be dismissed, and that their successors in office be substituted for them in this action.

6. All motions not specifically addressed or ruled on in this order are DENIED as moot.

The clerk of court is DIRECTED to enter judgment in accordance with this order.

SO ORDERED, this 3rd day of April, 1981.

/s/ HORACE T. WARD

HORACE T. WARD, JUDGE
UNITED STATES DISTRICT COURT

ORDER OF THE DISTRICT COURT ON MOTION TO ALTER OR AMEND THE JUDGMENT

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIA ASSOCIATION OF RETARDED CITIZENS, et al.,
Plaintiffs,
v.
DR. CHARLES McDANIEL, et al.,
Defendants.

Civil Action No. C78-1950A

ORDER OF COURT

This matter is currently before the court on plaintiffs' motion, pursuant to Fed.R.Civ.P. 59, to alter or amend this court's judgment of April 3, 1981. Also pending is a motion filed by the local defendants to stay the execution of the judgment pending consideration of plaintiffs' motion to alter or amend. The court will address these motions seriatim.

A. Motion to Alter or Amend the Judgment

Plaintiffs' motion seek to alter the court's judgment in several respects. Specifically, the plaintiffs seek an amended order requiring: (a) that the parties present to the court a plan regarding the implementation of the court's judgment; (b) that the state defendants adjust the criteria for monitoring the local educational agencies' compliance with the Education for All Handicapped Children

Act ("Handicapped Act"), 20 U.S.C. §1401 *et seq.;* (c) that notice of the court's judgment be given to hearing officers who will hear appeals pursuant to the Handicapped Act's due process procedure; (d) that the state defendants give notice of the court's judgment to all members of the class, especially those class members who have been denied extended programs in administrative hearings; (e) that local and state educational agencies be required to provide certain statistical information regarding the provision of extended programs; (f) that the state defendants develop criteria to be given to the local authorities regarding the provision of extended programs; and (g) that certain aspects of the state's due process procedure under the Handicapped Act be modified. Plaintiffs contemplate a broad role for themselves in the implementation of the court's order.

After due consideration, the court hereby concludes that plaintiffs' motion to alter or amend the judgment must be DENIED. The general nature of the requests contained in plaintiffs' motion has already been considered as similar suggestions were contained in plaintiffs' Post-Trial Memorandum of Law submitted to the court prior to the rendering of final judgment in this matter. After serious consideration, the court declined to follow that approach and fashioned the judgment as filed. The court is of the view that its memorandum opinion and the judgment pursuant thereto clearly delineates the defendants' respective obligations under the applicable federal statutes, and that no additional order is necessary at this time for proper implementation. The broad remedial and supervisory relief requested by the plaintiffs is not warranted by the current facts and circumstances of this case. The court is mindful that this is a class action but

feels that the relief granted is adequate for the class.

The court notes that certain aspects of the specific relief sought by the plaintiffs in their motion to alter or amend are implicitly required by the original ruling or by provisions of the relevant federal statutes. Specific examples of this would include the obligation of the state defendants to inform local educational authorities in the state of Georgia of the court's ruling as well as the obligation to inform hearing officers. The state defendants have these obligations absent further order of the court. Further, the Handicapped Act requires the state educational authorities to monitor compliance of local authorities with the provisions of the Handicapped Act.

The general tenor of plaintiffs' request appears to presume that the defendants do not intend to comply with the terms of the court's decision. The court has no justification for such a presumption in this case. The court is of the opinion that the possibility of applications for and the issuance of sanctions for noncompliance is sufficient to insure that the defendants will abide by the mandate of the court.[1]

B. **Motion for Stay of Execution of Judgment**

The local defendants have filed a motion to stay execution of the judgment dated April 3, 1981 pursuant to the provisions of Rule 62(b) of the Federal Rules of Civil Procedure. Said defendants suggested that they would have filed a stay of injunction pending appeal pursuant

[1] Footnote 2 to plaintiffs' brief in support of the motion to alter or amend indicates an assumption by plaintiffs that the court's order regarding the 1981-82 school year applies to the summer months of 1981. However, in directing reconsideration for the 1981-82 school year, the court was referring to the school year that begins in the fall of 1981 and continues through the summer of 1982.

Rule 62(c), but had been effectively prevented from doing so because of the pendency of plaintiffs' motion to alter or amend the judgment. Accordingly, the motion of the local defendants has been treated as a motion for a stay under Rule 62(b). A reading of the brief in support of the local defendants' motion for stay of execution indicates that the defendants are seeking a stay pending a resolution of plaintiffs' motion to alter or amend the judgment. This being the case, the motion of the local defendants is now moot as the court has denied the plaintiffs' motion. Thus, the defendants' motion for stay of execution of judgment is hereby DENIED.

SO ORDERED, this 14th day of May, 1981.

/s/ HORACE T. WARD

HORACE T. WARD
UNITED STATES DISTRICT JUDGE

JUDGMENT OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 81-7485

D.C. Docket No. C78-1950A

GEORGIA ASSOCIATION OF RETARDED CITIZENS, ET AL.,
Plaintiffs-Appellees, Cross-Appellants,

versus

DR. CHARLES MCDANIEL, ETC., ET AL.,
Defendants-Appellants, Cross-Appellees.

Appeals from the United States District Court for the Northern District of Georgia

Before HILL and VANCE, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that defendants-appellants/cross-appellees pay to plaintiffs-appellees/cross-appellants, the costs on appeal to be taxed by the Clerk of this Court.

October 17, 1983

HILL, Circuit Judge, dissenting.

ISSUED AS MANDATE: Dec 13 1983

COURT OF APPEALS'

DENIAL OF MOTION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7485

[U.S. Court of Appeals, Eleventh Circuit,
Filed Dec. 2, 1983; Spencer D. Mercer, Clerk]

GEORGIA ASSOCIATION OF
RETARDED CITIZENS, et al.,
Plaintiffs-Appellees,
Cross-Appellants,

versus

DR. CHARLES MCDANIEL, etc., et al.,
Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion October 17, 11 Cir., 1983, ____ F.2d ____).

(December 2, 1983)

Before HILL and VANCE, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

(√) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active

service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ JAMES C. HILL
United States Circuit Judge

No. 83-1431

In The

Supreme Court of the United States

October Term, 1983

DR. CHARLES McDANIEL, et al.,
Petitioners,

vs.

GEORGIA ASSOCIATION OF RETARDED CITIZENS, et al.,
Respondents.

No. 83-1451

THE BOARD OF PUBLIC EDUCATION FOR THE CITY OF SAVANNAH AND THE COUNTY OF CHATHAM, et al.,
Petitioners,

vs.

GEORGIA ASSOCIATION OF RETARDED CITIZENS, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED[1]

1. Do the Education for All Handicapped Children Act of 1975 and the Vocational Rehabilitation Act of 1973, as amended, require the individual consideration of the duration of a child's special education program? If so, does the requirement that children be individually considered for durational needs conflict with this Court's decision in *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982)?

2. May private litigants maintain concurrent class claims under the Education for All Handicapped Children Act and the Vocational Rehabilitation Act if a named representative has exhausted all administrative remedies, and if further exhaustion is futile?

3. Is the entitlement that handicapped children receive individual programs based on their unique needs sufficiently unambiguous so that the required consideration of the duration of services does not conflict with *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981)?

4. Is the requirement under Section 504 that an "otherwise qualified handicapped" child of public school age have his individual needs considered and provided in order to provide an equal educational opportunity permissible if such consideration is necessary to assure the child receive some benefit from education?

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1. Two sets of petitioners have separately filed for certiorari and been assigned case Nos. 83-1431 and 83-1451. Respondents file this single response, combining and recasting the various questions presented in the two petitions.

5. May a certified class action continue if after judgment the individual claim of one of the class representatives is mooted against one set of defendants, but the individual claims against other defendants and all class claims remain active controversies? Under *Rowley*, does the finding of procedural violations against a class of children institute an injury so as to present a case or controversy under Article III of the Constitution?

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Respondents do not contest that petitioners have timely filed their petitions for certiorari. Respondents do not believe that any of the considerations under Rule 17 of the Supreme Court have been met. Contrary to the assertion of petitioners the Circuits are not in conflict concerning this case's issues. Moreover, the Circuit has correctly applied the rulings of this Court. Finally, the limited relief afforded respondents minimizes the questions concerning the role of the judiciary and thus the magnitude of the federal questions. The Court should deny the discretionary review requested.

No. 83-1431

In The

Supreme Court of the United States

October Term, 1983

DR. CHARLES McDANIEL, et al.,
Petitioners,

vs.

GEORGIA ASSOCIATION OF RETARDED CITIZENS, et al.,
Respondents.

No. 83-1451

THE BOARD OF PUBLIC EDUCATION FOR THE CITY OF SAVANNAH AND THE COUNTY OF CHATHAM, et al.,
Petitioners,

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATEMENT OF THE CASE

A. Factual Summary

The trial court fully described the nature of the instant case in *Georgia Association of Retarded Citizens v.*

McDaniel, 511 F.Supp. 1263, 1265-1266 (N.D. Ga. 1981) (hereinafter "*GARC*") and respondents adopt that statement. In summary, this class action addressed the arbitrary denial of educational services of appropriate duration to mentally retarded children. The petitioners seek review of a decision that the Education for All Handicapped Children Act of 1974, P.L. 94-142, 20 U.S.C. §1401 et seq. (hereinafter "Act"), and Section 504 of the Vocational Rehabilitation Act, as amended, 29 U.S.C. §794 et seq. (hereinafter "Section 504") require the consideration of the need for educational services in excess of 180 days a year during a review of a child's "appropriate education."

The petitioners Board of Public Education for the City of Savannah and County of Chatham, et al. (hereinafter "local defendants") and Dr. Charles McDaniel and State Board of Education[1] (hereinafter "State defendants") neglected to summarize several aspects of the evidence and proceedings below.

Prior to the September 1, 1978 enforcement date in the Act, Russell Caine and hundreds of members of the Georgia Association for Retarded Citizens (hereinafter "Association") had been absolutely denied access to public school services. They had received "training" in social service training centers or in institutions. It is undisputed that due to the known needs of retarded children, the duration of these programs was for eleven and-a-half months. *GARC,* 511 F.Supp. at 1267. Nevertheless, it is also un-

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1. Each set of defendants has filed a petition. These have been separately docketed as 83-1431 and 83-1451. Respondents file this single brief in response.

disputed that these training services were of inferior quality and provided by uncertified instructors. *Id.* On March 3, 1978 Mr. and Mrs. Caine attended an "IEP" conference about their son. At that time the duration of schooling for all children was already planned and limited to 180 school days. Russell, despite requirements of the Act, had not yet been evaluated by the local defendants. The duration of his IEP was due to the policy of restricting educational services to programs of 180 days. *Id.* at 1268-69. It was not based on his individual needs and it was not based on any choice of educational theories.

The Caines appealed the placement decision in April 1978, under the Act and Section 504. At no time during the administrative process was an objection raised to the concurrent coverage of these two federal statutes.

During the administrative procedures the local defendants offered the testimony of State Board personnel. The testimony demonstrated that they were aware that a child could require more than 180 days of services in order to provide him/her with a "free appropriate public education." At the administrative stage they testified that they had no policy on the 180-day issue. At the beginning of the case they indicated that all children with needs for more than 180 days of educational services could be institutionalized. During the litigation they altered this position to "permit" local boards to establish voluntary programs, but the trial court found that the State's other actions denied children access to even these services. The testimony of these officials over a three-year period of time never established or even suggested that the restrictive policy was due to an "educational" decision. The clash

between the position that no policy existed and the later legal assertions that they had made "educational choices" was never explained. The trial court made findings that State and local defendants maintained policies which prevented the consideration of programs of more than 180-day duration. These were affirmed by the Circuit.

The evidence and findings also do not support the State defendants' scenario of a battle of educational theories. The trial court, weighing the credibility and demeanor of the witnesses, rejected the testimony of local defendant personnel that none of the children required more than 180-day programs. The defendants presented a "study" which they asserted showed that the Chatham County children did not need extended school services. The probative value of this study was rejected by the trial court because of its lack of validity and reliability. *GARC*, 511 F.Supp. at 1274. The study did not address the programs the children were actually receiving. TR. 2704-06; 2780.

The principal experts for each side agreed on the use of both behavioral and developmental methods. TR. 226, 2510. More vital to the instant petition, Dr. Turner, the defendants' expert, admitted that there is no foundation in educational theory to the 180-day program. TR. 2717.

Although plaintiffs criticized many aspects of the educational services provided children in Savannah, TR. 178-180; 815-816, the focus of this case was that the duration of the educational opportunities was insufficient to permit any reasonable progress for many severely retarded children. E.g., PL. Ex. 20 at 44. Testimony of witnesses uniformly agreed that individual consideration of minimal

program needs includes services of a duration in excess of 180 days. TR. 164, 206, 3047-48.

The petitioners suggest that the Caine family is the only one which has stepped forward to request extended school services. This directly conflicts with the testimony at trial. See TR. 346-349; 529-532. It is refuted by the numerous decisions of the State defendants in administrative hearings rejecting parents' claims for school services in excess of 180 days. *GARC,* 511 F.Supp. at 1270, n.5 and n.7. See also, PL. Ex. Nos. 37, 90, 91, 92, 93 and 94. The fact that there are many other families, all Association members, who have been injured by defendants' policies is further demonstrated by nine affidavits submitted to the Circuit in opposition to a motion to vacate the trial court order.

Finally, the petitioners imply that the existing costs of their programs should limit their responsibility for services of adequate duration. The evidence of record indicates that resources were not an issue at trial, nor were they a factor in limiting the available programs. The local defendants had large yearly budget surpluses; the State defendants never utilized their entire State allotment under Title VI-B of the Act. Counsel for local defendants while introducing cost estimates expressly stated to the Court it was not their position that they were without sufficient resources to provide programs. TR. 1085. Moreover, the administrative decision in this case held that available funding was not an issue or a permissible criterion in determining the placement of a child. PL. Ex. 9 at 8-9). This ruling by the State defendants was never challenged at trial.

B. Procedural Summary

Respondents note that each set of petitioners moved the trial court for a stay of plaintiffs' attorney fee pending appeal. This stay was granted and the trial court and the Circuit have not addressed or resolved the right to such an award.

REASONS FOR DENYING THE PETITIONS

A. Summary of the Argument

(1) The decision of the Eleventh Circuit that individual consideration of children's special education needs requires consideration of the duration of teaching opportunities is entirely consistent with Federal law and an unbroken line of decisions. The holding is also consistent with this Court's opinion in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982).

(2) A Federal Court may entertain concurrent claims under both the Education for All Handicapped Children's Act and the Vocational Rehabilitation Act if a named representative has exhausted administrative remedies and if further exhaustion is futile. There are no cases which conflict with the Circuit's decision on permitting these claims for relief.

(3) The entitlement to appropriate education services is clear under federal law. This obligation has been voluntarily assumed by the State of Georgia, and, therefore, a finding which clarifies the procedural rights of

children or construes the term "appropriate" does not conflict with *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981).

(4) The holding under Section 504, 29 U.S.C. §794, that "otherwise qualified" children must be individually educated and provided programs which grant them an opportunity to benefit from their education does not conflict with *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

(5) The moving of class representatives from the district of one set of defendants, if it occurs after certification and after judgment, does not by itself moot the class claims against those defendants. A Federal Court's limited holding that Federal due process procedures were violated by the failure to adequately consider the duration of educational services is sufficiently concrete to permit relief under Article III of the Constitution.

B. Argument

I.

Every Federal Court Reviewing The Special Education Requirements Has Held That School Services On A Yearly Basis Must Be Considered. These Holdings Are Based On The Requirement of Individual Consideration.

(a) All The Circuits Agree That Individual Needs Require The Consideration Of A Child's Duration of Educational Services.

The holdings of the district court and the Circuit are consistent with an unbroken chain of decisions concerning

special education services. Prior to this Court's decision in *Board of Education of Hendrick Hudson Center School District v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034 (1982) (hereinafter *"Rowley"*), courts had anticipated that ruling and its emphasis on the individual needs of students. They permitted claims for schooling in excess of 180 days or invalidated policies which restricted the consideration of such programs. These courts included: *Battle v. Pennsylvania,* 629 F.2d 269 (3rd Cir. 1980), *cert. denied,* 452 U.S. 968 (1980); *Anderson v. Thompson,* 495 F.Supp. 1256, 1265 (E.D. Wis. 1980), *aff'd on other grounds,* 658 F.2d 1205 (7th Cir. 1981); *Garrity v. Gallen,* 522 F. Supp. 171, 240 (D. N.H. 1981); *Lee v. Clark,* No. 80-0918 (D. Hawaii, Jan. 30, 1981); *Moore v. Roberts,* No. LR-C-81-419 (E.D. Ark., July 24, 1981); and *Hilden v. Evans,* No. 80-511-RE (D. Oregon, Nov. 5, 1980). See discussion, *Yaris v. Special Sch. Dist. of St. Louis County,* 558 F.Supp. 545, 556-57 n.4. (E.D. Mo. 1983). Cf. *Bales v. Clark,* 523 F.Supp. 1366 (E.D. Va. 1981).

The Federal courts which have reviewed this issue since *Rowley* all agree that the 180-day rules violate Federal law. *Crawford v. Pittman,* 708 F.2d 1028 (5th Cir. 1983); *Yaris v. Special Sch. Dist. of St. Louis County,* 558 F.Supp. 545 (E.D. Mo. 1983); and *Phipps v. New Hanover County Bd. of Education,* 551 F.Supp. 732 (E.D.N.C. 1982). Moreover, other states have flexible rules which permit more than 180 days. See, e.g., *Timms v. Metro. Sch. Dist. of Wabash County, Ind.,* 722 F.2d 1310, 1316 n.2, 1317 n.3 (7th Cir. 1983).

This consistency urges against the need for certiorari. The petitioners have not cited a single case which holds

that severely handicapped children should not have the duration of their educational programs based upon their individual needs. They have not shown any grounds under Rule 17 of this Court for granting this petition.

(b) The Holdings In This Case Do Not Conflict With Rowley.

In *Rowley* this Court held that Federal courts may review actions of educational agencies to assure that the Act's procedural requirements have been followed and to assure that the services provided the children are "individually designed" and reasonably calculated to enable the child to receive educational benefits. *Rowley*, 458 U.S. 176, 102 S.Ct. 3034 at 3048, 3051.

The trial court, in the instant case, relying on the emphasis on the individual needs of the student and citing *Battle v. Pennsylvania*, 629 F.2d 269 (3rd Cir. 1980), held that the defendants' refusal to consider educational programs of more than 180 days was a procedural violation under the Act. It then afforded relief by enjoining the arbitrary procedures and requiring that IEP meetings address the unique needs of each handicapped child. The Eleventh Circuit affirmed this result. *Accord, Crawford v. Pittman*, 708 F.2d 1028 (5th Cir. 1983).

In essence, the holdings reason that the duty to provide appropriate programs to handicapped children becomes more complex as their impairments increase. The test of appropriateness, as this Court recognizes in *Rowley*, is more difficult than whether the child is achieving on grade level. The Act does require that goals and criteria for achieving them be developed in the child's IEP. If

these were adequately designed but are not achieved or the child's condition regresses, then *Rowley* teaches that prospective changes in the program may be necessary. See also, *Battle v. Pennsylvania*, 629 F.2d 269, 276-277 and n.9, (3rd Cir. 1980). One option open to school committees must be to increase the duration (or teaching opportunities) available to the children. See, TR. 3047-48. The decision below held that this must be considered on an individual basis and that the inflexibility of the 180-day rule violated the procedural requirements of the IEP process. The Eleventh Circuit below and the Third and Fifth Circuits are correct in their analysis. They apply the rationale of *Rowley* to difficult decisions concerning severely impaired children.

II.

The Act And Section 504 Can Be Applied Concurrently In Considering The Needs Of Handicapped Students.

(a) The Circuits Do Not Conflict On The Maintenance Of A Claim For Relief Under Both Federal Statutes.

The petitioners assert that there is a conflict in the Circuits concerning whether a plaintiff may bring a claim under both Section 504 and the Act. The leading case they cite is *Timms v. Metro Sch. Dist. of Wabash County, Ind.*, 718 F.2d 212 (7th Cir. 1983). That opinion was amended on November 18, 1983 by the Seventh Circuit directly on the point in issue. The Court then held that Section 504 and the Act may be raised in the same matter. *Timms v. Metro Sch. Dist. of Wabash County, Ind.*, 722 F.2d 1310, 1317 (7th Cir. 1983).

The petitioners also cite *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981) in support of this conflict. That opinion addresses the interplay between the Act and 42 U.S.C. §1983. *Timms* makes it clear that *Anderson* did not foreclose Section 504 claims.

The remaining cases cited in support of a conflict, *Smith v. Cumberland School Committee*, 703 F.2d 4 (1st Cir. 1983) and *Doe v. Koger*, 710 F.2d 1209 (7th Cir. 1983), each address attorney fee considerations. The question of whether an attorney fee may be awarded pursuant to 42 U.S.C. §1983 and/or 29 U.S.C. §794a is significantly different than an analysis of whether a claim for relief may be plead concurrently under the Act and 29 U.S.C. §794. More telling, the attorney fee issue is not available for review as it was stayed by the trial court on the defendants' motion.

A closer review of the decisions shows that in addition to the Seventh and Eleventh Circuits, the Second, Third, Fifth and Eighth have all permitted concurrent claims under the Act and Section 504. See, respectively, *Jose P. v. Ambach*, 669 F.2d 865, 871 and n.4 (2d Cir. 1982); *Tokorcik v. Forest Hills Sch. Dist.*, 665 F.2d 443, 449 and n.8 (3d Cir. 1981); *S-1 v. Turlington*, 635 F.2d 342, 347 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981); and *Monahan v. Nebraska*, 687 F.2d 1164, 1170 (8th Cir. 1982), *cert. denied*, — U.S. —, 103 S.Ct. 1252 (1983).

(b) Exhaustion of Administrative Remedies Is Not An Issue In This Case.

Petitioners cite numerous cases which seem to conflict on whether the exhaustion of administrative remedies

under 20 U.S.C. §1415 and/or 34 C.F.R. 104.36 are required. The Caine family in this case exhausted its remedies by completing administrative hearings under both the Act and Section 504. The courts below have never had to address the necessity of exhaustion and that conflict, if it exists, is not available for review in this case. Moreover, it is well-settled that futility excuses exhaustion requirements. The existence of the restrictive policy, when coupled with the numerous futile efforts by parents in the administrative process, counter balances any duty to further exhaust.

(c) Exclusivity It Not Required.

The petitioners misplace their reliance on *Brown v. General Services Administration,* 425 U.S. 820 (1976) in urging the exclusive nature of the Act. The argument neglects the clear history that the enforcement of the Act and Section 504 were knowingly designed to complement each other. See descussion, *GARC v. McDaniel,* 716 F.2d 1565, 1579-80 (11th Cir. 1983).

This argument also overlooks the impact of the 1978 amendments to Section 504. P.L. 95-602, 92 Stat. 2982. The provisions of 29 U.S.C. §794a(a)(2) granted handicapped persons the remedies and procedures of Title VI of the Civil Rights Act of 1964. In *Cannon v. University of Chicago,* 441 U.S. 677 (1979), this Court held that Congress understood that Title VI created a private right of action. In 1978 Congress knew that the courts were permitting private litigation under both Title VI and Section 504, and they also knew that the agency and the courts were concurrently applying these statutes. This drastically contrasts with the situation analyzed in *Brown* con-

cerning Title VII. Exclusivity was not intended in the passage of the Act in 1975 and in the amendment of Section 504 in 1978.

Finally, the trial court granted relief under both statutes. Review of the Section 504 claims will leave undisturbed the holding under the Act. The Section 504 issues are themselves insufficient to require that this case be reviewed under this Court's discretionary authority.

III.

The Act Creates A Clear Entitlement To Appropriate Education Services. This Right Does Not Abrogate The Holding in Pennhurst.

This Court decided in *Rowley* that the Act creates enforceable rights. *Rowley*, 458 U.S. 176, 102 S.Ct. 3034, at 3048-49. In spite of this holding the petitioners utilize the "unambiguous" condition language in *Pennhurst v. State School v. Halderman*, 451 U.S. 1 (1981) (hereinafter "*Pennhurst*") to suggest that the Circuit erred. This reliance is misplaced.

It is clear from *Rowley* that the Act's requirement that individual needs be determined by the IEP may impose an obligation to provide services which are not delineated in the legislation. The Act does impose the duty of appropriateness, 20 U.S.C. §1401(18). It also requires that the *duration* of the services must be established in the IEP process, 20 U.S.C. §1401(19)(D), and that there can be a court review to determine if the procedures and program offered are appropriate, 20 U.S.C. §1415(e). This Court and the Circuits have noted that Congress intentionally choose to create a right but did not identify each type of

service which would be necessary. Its focus was on the process and a child's progress.

These requirements overcome the ambiguity argument. Further, the Court in *Pennhurst* cites *King v. Smith*, 392 U.S. 309 (1968) as an example of Congress' capability of imposing an explicit condition on funds. *Pennhurst*, 451 U.S. 1 at 17-18. In *King*, the issue was whether the definition of "parent" which included the mother's paramour, violated that funding statute. The Court held that the term "parent" was unambiguous and that services the State said they did not foresee could be required based on a construction of that term. In this case Congress provided more notice than in *King* through its use of the word "appropriate," Congress has put the state on notice that this term creates an entitlement to a range of services. The "ambiguity" argument should not be used to circumvent the duty to provide necessary programs.

IV.

Education Services Are Enforceable Under Section 504.

The class in this case consists of handicapped children who can benefit from school if provided appropriate services. They have a State constitutional right to education and a Federal statutory right to special education. They are "otherwise qualified" persons under Section 504.

In spite of this, the petitioners state that Section 504 does not require "affirmative programs" and, therefore, the Circuit erred in granting relief under this statute. They cite *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). That holding was predicated on the finding

that the nursing student was not "otherwise qualified" for the program. The trial court in this case made an uncontested finding that plaintiff class was qualified for educational services. Moreover, the obligations to school age children under the Act and the duty of a college to an applicant are cut from such different cloth that reliance on *Davis* is misplaced. Ms. Davis had no right of entry into the program, only a right of reasonable accommodation if she meets their standards for acceptance. The plaintiff class has a right to education suited to their needs which recognizes that they are handicapped but still provides them an opportunity to learn.

The petitioners also overlook that the trial court relied on *Lau v. Nichols,* 414 U.S. 563 (1974) in its Section 504 holding. That holding forecloses the local defendants' argument that their obligation is limited to only providing programs available to non-handicapped students. Further, the *Lau* holding is reinforced by the several opinions in *Guardians Association v. Civil Service Commission of City of New York,* — U.S. —, 103 S.Ct. 3221 (1983). The prospective provision of more than 180 days of service, if such is necessary for a child to benefit from education, is in accord with this holding. The Title VI standards apply to Section 504 by virtue of 29 U.S.C. §794a.

The petitioners also claim that the ruling orders affirmative actions outside the mandate of Section 504. This argument is not supported by the record. They never demonstrated any financial restraints and they never attacked the State administrative decision on this issue. Moreover, the scope of the relief indicates that the "line between a lawful refusal to extend affirmative action and illegal dis-

crimination" has been carefully drawn to include individual programs for these handicapped children. *Southeastern Community College v. Davis,* 442 U.S. 397, 412 (1979).

V.

Plaintiff Class Presents Live And Justiciable Issues.

(a) The Case Is Not Moot Against Local Defendants

One of the named class representatives, after entry of judgment, moved from the local defendants' county. This individual retains his claims against the State defendants. The mooting of his individual claims against the local defendants after certification does not render the action moot. *United States Parole Commission v. Geraghty,* 445 U.S. 380 (1980). Further, Russell Caine (and the Association) may still represent class claims against the local defendants as they continue to "fairly and adequately protect the interests of the class." *Id.* at 405, 406-407, quoting *Sosna v. Iowa,* 419 U.S. 393, 403 (1975). See, *Califano v. Yamasaki,* 442 U.S. 682 (1979). Additionally, the fact that other class members have not exhausted is not dispositive of the mootness issue. It is well-settled in other areas where Congress created jurisdictional prerequisites to suit that non-exhausting individuals may maintain the action and seek relief. See, *Albemarle Paper Company v. Moody,* 422 U.S. 405 (1975); *Romasanta v. United Airlines, Inc.,* 537 F.2d 915 (7th Cir. 1976) *aff'd sub nom, United Airlines, Inc. v. McDonald,* 432 U.S. 385 (1977). The Caines and the Association maintain a stake in the outcome.

(b) The Circuit Affirmed Relief To Real Litigants

The petitioners also suggest that the trial court opinion was advisory and should therefore be vacated. To the contrary, the relief afforded respondents was appropriately limited by the trial court to minimize judicial intrusion into educational decisions. Anticipating *Rowley*, the District Court found that the defendants had violated the procedural requirements of the Act. It enjoined the impermissible policy and returned all of the plaintiff children to the IEP process for reconsideration of their needs. This relief was structured to make as limited an intrusion on educational agencies as necessary.

The adjudication of procedural violations is the essence of *Rowley*. The findings in this case show an impairment which produced a legally cognizable injury. *Baker v. Carr*, 369 U.S. 186, 208 (1962). The relief went to the heart of the respondents' entitlement: a fair, unbiased individual educational plan. See, *Califano v. Yamasaki*, 442 U.S. 682 (1979).

CONCLUSION

Respondents strongly resist certiorari. The lower courts are in agreement on the rights and procedures afforded handicapped children. Some of the issues urged for review are not presented in this case and have not been analyzed by the Circuit or trial court. Moreover, the relief afforded plaintiffs speaks of a careful and limited role of the trial court. The Court has corrected the

procedures and returned plaintiff and class members to the IEP process for a review of their needs.

Respectfully submitted,

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No. 83-1431

IN THE

Supreme Court of the United States

October Term, 1983

Dr. Charles McDaniel, et al.,
Petitioners,

v.

Georgia Association of Retarded Citizens, et. al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Amici Curiae Brief of the National School Boards Association and National Association of Secondary School Principals in Support of Petition for Writ of Certiorari

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No. 83-1431

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

Dr. Charles McDaniel, et al.,
Petitioners,
v.
Georgia Association of
Retarded Citizens, et. al.,
Respondents.

Motion of National School Boards Association and National Association of Secondary School Principals for Leave to File Brief as Amici Curiae

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The National School Boards Association and National Association of Secondary School Principals move this court for leave to participate as amici curiae herein for the purpose of filing the attached brief.

The National School Boards Association is a nonprofit federation of state public school boards associations,

which represent local school boards having responsibility for the education of more than ninety-five percent of this nation's school children.

Every school district in the country receives, or is eligible to receive, financial assistance under the Education for All Handicapped Children Act of 1975, 20 U.S.C. Section 1401 et seq. (the Act). In addition, every school district in the country receives or is eligible to receive, other federal financial assistance and, therefore, is subject to the requirements of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (Section 504), even if no financial assistance is received under the Education for All Handicapped Children Act. Respondents rely on both acts in asserting their claim that the Petitioners are violating the rights of handicapped children.

The decision below will have a substantial effect on the content, financing and administration of the educational program of every school district in the country. It is, therefore, of great importance to the full understanding of the implications of this action, that the court herein be fully apprised of the nature of education programs throughout the country and the potential effects of such a decision on those programs.

A 1981 study commissioned by the U.S. Department of Education, The Cost of Special Education, conducted by the Rand Corporation, found that the cost of educating handicapped children is 2.17 times greater than the cost of educating a non-handicapped child. An education for a severely retarded child cost, in 1977-78, an average of $5926 annually. The cost of educating handicapped

children is twice that of that "average" child, with costs for educating handicapped children and youths rising at a rate twice that of instructional or operating budgets. Few school districts presently operate year-round programs for handicapped children. Therefore, the cost increases, over those noted, above that would be necessitated by the decision below could be substantial.

As the decision in this case will have an impact on school districts throughout the country, the National School Boards Association and the National Association of Secondary School Principals urge this court to grant leave to present their views.

Petitioners have consented to the filing of this brief.

Respectfully submitted,

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Brief of Amici Curiae
National School Boards Association and National Association of Secondary School Principals

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INTEREST OF THE AMICI CURIAE

Amicus curiae, National School Boards Association is a nonprofit federation of this nation's state public school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. It is organized to

promote the general advancement of education, to encourage the most efficient and effective organization and administration of the public schools, and to preserve the unique American tradition of local lay control of schools, with education policy decisions rendered by those directly accountable to the public through the elective or appointive process. Established in 1940, the National School Boards Association is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who make up this nation's school boards are predominantly elected or appointed lay community representatives, responsible under state

law for the fiscal management, staffing, continuity and educational productivity of the public schools within their jurisdictions. The National School Boards Association submits this brief in the belief that decisions such as the one below threaten the ability of the nation's school boards to effectively educate all the students entrusted to their care by eroding significantly the authority of states and school boards to make educational determinations based upon local and state fiscal and administrative concerns.

Amicus curiae National Association of Secondary School Principals (NASSP) is a voluntary association of approximately 34,000 administrators of public and private secondary schools throughout the United States. These men and women are directly responsible for the education of

some 20 million American youth attending schools in 16,000 school districts. NASSP customarily does not intervene in private litigation. Its interest in this case stems from its strong conviction that the issues presented here are of urgent importance both to all of its members and to public education generally.

Passage of the Education for All Handicapped Children Act of 1975 was widely acclaimed and strongly supported by nearly all elements of the professional education community. However, by 1978, it had already become apparent that the Congress of the United States had no intention of funding education for the handicapped at anything near the level of additional cost and effort which the law, as interpreted by the Executive branch, would require. In

addition, professional advocacy groups were turning to the federal courts in a continuous effort to expand the scope of the Act and the costs of meeting its requirements. As a result, sympathetic educational groups, like the National Association of Secondary School Principals, were forced to express concern by a resolution adopted at its national convention that year, which stated:

> NASSP reaffirms its long-standing commitment to handicapped children and youth to the end that participation in quality educational experiences will enable them to attain their full potential. At the same time, in order to achieve the objectives of P.L. 94-142, NASSP recommends that the federal government insure financial support commensurate with that required of the states and local school districts.
>
> The Association takes a dim view of any and all federal programs which mandate certain services while leaving the

funding burden to states and municipalities least able to afford them.

Since 1978, Congress has actually decreased its financial support for education programs and the Executive branch has sought even deeper cuts in the level of support. Efforts to expand the scope of coverage of the Act through judicial interpretation have continued unabated, however. The case at bar represents just one more such attempt, and amici object on the basis that such interpretations, absent the financial support needed to meet them, are fundamentally unfair.

REASONS FOR GRANTING THE WRIT

1. The lower Court exceeded its authority under the Supreme Court's decision in **Board of Education of Hendrick Hudson School District v.**

Rowley, 458 U.S. 176 (1982), by substituting its own view of the best educational methodology for that of the State by requiring a restructuring of the "traditional" school year to have summer programs available for handicapped children regardless of whether such programs are otherwise available.

2. The lower court violated the Supreme Court's decision in Southeastern Community College v. Davis, 442 U.S. 397 (1979) by making affirmative requirements of the state of Georgia to provide summer school services to handicapped children even though the services are not available to non-handicapped children.

3. Even assuming that the services required by the lower court to be provided, are "appropriate", the cost of meeting those requirements is so excessive as to be unreasonable under the standard set in Rowley, supra.

ARGUMENT

The decision of the lower court does not involve a simple judicial interpretation of a statute defining the student services to be provided by Georgia school districts which receive federal funding for handicapped children. To the contrary, the precedent set by this decision and others such as Scanlon v. Battle, 629 F.2d 269 (3rd Cir. 1980), cert. denied, 452 U.S. 968 (1981), affects every school district in the country and could result in a major revision of the very nature of the public educational system.

The potential financial impact to public education of this case is significant. The National School Boards Association estimates that it could cost over one billion dollars more annually to educate the country's handicapped children if the lower court's decision is allowed to stand. This estimate was made on the basis of the statistical information in the Department of Education's Report to Congress: " To Assure the Free Appropriate Public Education of All Handicapped Children" 1982. The average annual cost per handicapped child ($3794) was divided by the number of school days per year (180) to reach $21 per day per handicapped child. In 1982 4,177,689 handicapped children were "counted" for purposes of P.L. 94-142, out of which 844,180 were "mentally retarded" and 348,954 were

"emotionally distrubed" making a total of 1,193,134 million children who would be likely to fall into the Respondent's class. [There were also over 1,468,014 "learning disabled" children who were not used in our computation.] It would cost approximately $840 per handicapped child to provide summer programs of 40 days. That figure times 1,193,134 million children reaches a total national annual expenditure of over a billion dollars. That amount would be increased depending on the number of additional days required (i.e. weekends and holidays in addition to summers) and would also be increased to the extent the average daily expenditures are increased because of support personnel costs -- administration, bus drivers, cafeteria workers, janitors, etc.

This Court has recognized that

financial exigencies are a relevant consideration for courts in determining whether a duty exists to provide a particular service, **Board of Education of the Hendrick Hudson Central School District v. Rowley**, 458 U.S. 176 (1982). The lower court, however, discounts the financial consequences of their decision. The decision as to whether to provide an extended school year to a particular child is made on an individual basis and not on the basis of the membership of the child in a particular classification of handicapped child. However, in planning state and local education budgets, state legislatures and local school boards will have to assure that every member of the classification of handicapped children for which a longer education period potentially would be "appropriate" will be counted in the total budget. Thus a

state might be able to meet the mandate of the court but in doing so would have to cut back the remainder of the educational program so as to exclude many other needy students.

If this level of expense is to be mandated of public education providers, it would seem that the mandate should come from the highest court in the land and not from lower courts.

Beyond the financial impact, decisions such as the Eleventh Circuit's threaten to erode state and local decision-making authority in education. The court has gone beyond a requirement that "meaningful access" to the school district not be denied to handicapped children. Rowley, supra. The court here seeks to change the very nature of the educational program -- a significant step which surely cannot be countenanced

without a full hearing by the U.S. Supreme Court.

This Court held in **Rowley**, that a court's inquiry in suits brought under the Handicapped Act is twofold: "First, has the State complied with the procedures set forth in the Act; and second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" supra. The district court in the case at bar held that both criteria had been met, but exceeded its authority by inserting its own views on the merits of a nine-month education progam. **Georgia Association of Retarded Citizens v. McDaniel**, 511 F. Supp. 1263, 1266, 1268 and 1282 (1981).

The plight of Respondents in this case, and of their parents, is

heartbreaking indeed. But the public school system is designed only to provide an equal access to all children. If public education is to be required to redesign that system so as to meet all the needs of only one classification of children to the exclusion of others -- that requirement should come from a higher source than a U.S. Circuit Court.

Education, as has been noted by this Court on several occasions, is a state function, **Milliken v. Bradley**, 418 U.S. 717 3112 (1974); **San Antonio ISD v. Rodriquez**, 411 U.S.1 (1973). The state determines first, whether it will provide a free education to its youth and second, who will provide that education. When it makes that first decision it makes it on the basis of the financial resources available and the various needs of the student population. The length of

the school year is not just an arbitrary state or local policy. It defines the parameters of the educational program which the state is agreeing to provide to its school age children. Within those parameters it may be that some children will be provided more services and some less services because of their individual needs -- but the school year identifies the nature of the educational program, not merely the type of services to be provided to individual students.

The lower court's statement that "the nine month school year is a tradition of only recent vintage", **Georgia Association of Retarded Citizens v. McDaniel**, 716 F.2d 1565 (11th Cir., 1983) is not true. Regardless of the merits of the "tradition" it has been a policy of almost universal application in this country since colonial days. The

Year-Round School 45-15, Hermansen & Gove; Year-Round Schools, Morris A. Shepard and Keith Baker; The Encyclopedia of Education, McMillan and Free Press, at page 597. Whether this policy is good or bad or obsolete, as apparently the lower court thinks it is, is irrelevant to the legal issues in this case. As this Court held in **Rowley**, supra courts must "avoid imposing their view of preferable educational methods upon the states."

Some states operate summer educational programs for certain handicapped children. Some states do not. Some local school systems provide summer educational programs through federal funding or other means. Most do not. But the issue here is whether every school district in the country, every state in the country, must operate a summer educational program and provide

services during that summer program to those handicapped children for whom such a program is deemed "appropriate."

Local school systems receive their funding from three sources: local property taxes, federal funding and state funding. State funding is based upon a formula computed as a dollar amount times the average number of children enrolled in the school district during the school year. The school year is set by the state at a prescribed number of days, based on the total amount. In most states the number of school days is set at 180. That does not mean the district may not hold school for a longer period, but the district will receive no state money for any period longer than 180 days.

Although the number of school days set is not scientific or based upon an

educational table of learning, it is also not arbitrary. The state legislature has determined through the very complex budgetary process that it has a certain amount of funds to devote to education. It then determines that it has sufficient funds to provide an education to all of its public school children for a period of 180 days. That 180 day period, therefore, is the period set for all public education in the state. Deviations from that period must be funded through other sources.

The court below is bypassing the orderly political and budgetary process of the state to restructure the educational program of the state and either require the state to extend its education program and fund local school districts for that extended period or to require the local school district to come

up with the additional funding itself through bond issues or some other illusory method.

The court below has exceeded its authority not only under the Education for All Handicapped Children Act but also under Section 504. The decision makes "affirmative" requirements of the state of Georgia under Section 504. As this court stated in Southeastern Community College v. Davis, supra at 410, "The language and structure of the Rehabilitation Act of 1973 reflects a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps."

One other unfortunate result of the decision is the potential increase in the

number of requests for due process hearings under the Act and under Section 504. School districts will be in the position of either offering a summer program for every handicapped child who is more than minimally handicapped or providing a due process hearing which itself is costly in both dollars and staff time.

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